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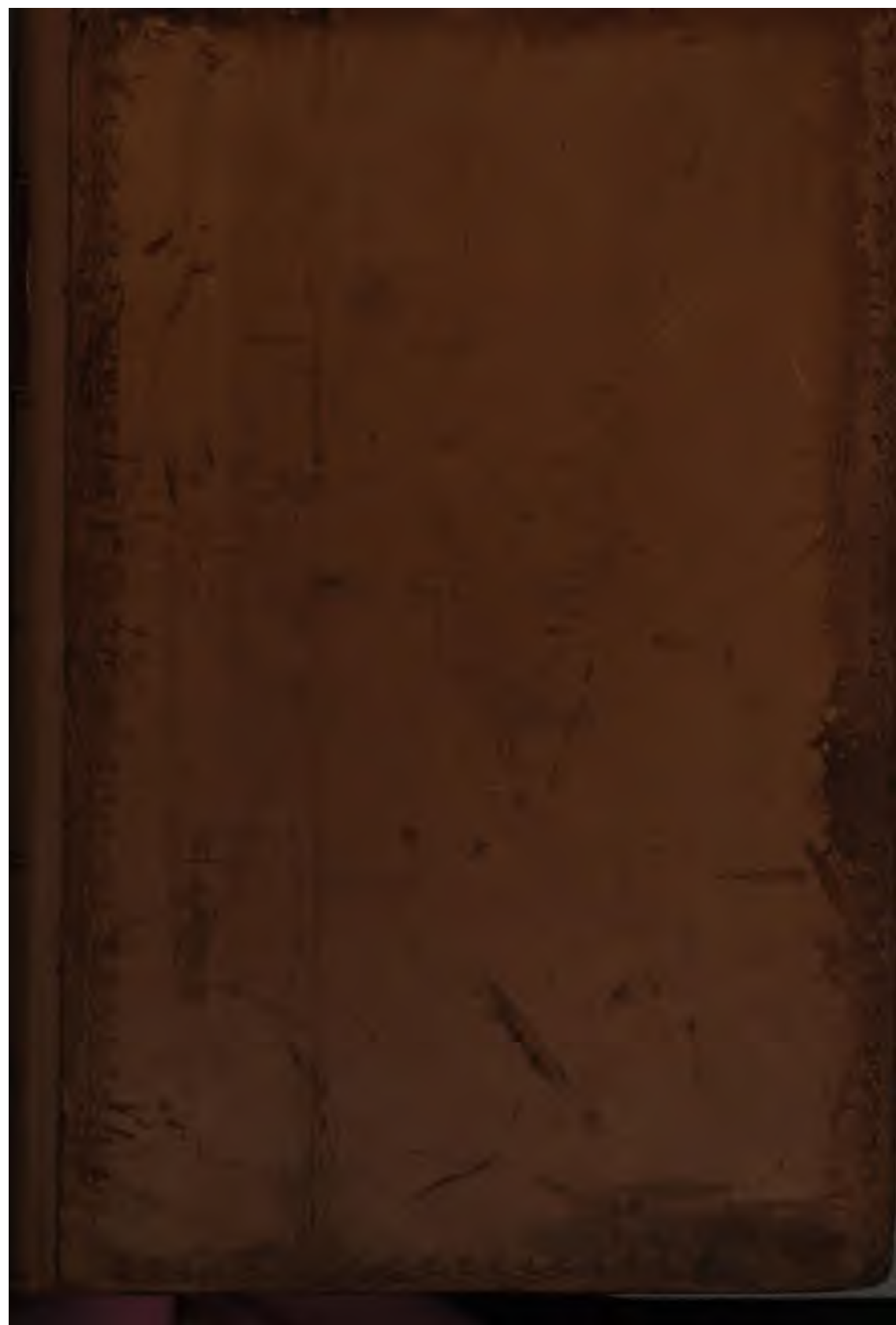
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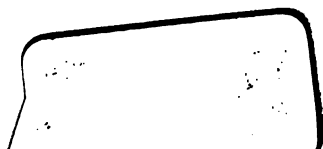
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THE
OFFICE AND DUTY
OF
EXECUTORS.



—♦♦♦♦♦—
BY
THOMAS WENTWORTH,
OF LINCOLN'S-INN, ESQ.

WITH THE SUPPLEMENT OF H. CURSON, GENT.
AND NOTES OF THE LATE SERJEANT WILSON,
AND OTHER EDITORS.

—
THE FOURTEENTH EDITION,
REVISED,
AND THE AUTHORITIES BROUGHT DOWN TO THE PRESENT TIME,
BY HENRY JEREMY,
OF THE MIDDLE TEMPLE, BARRISTER.

—
LONDON:
J. & W. T. CLARKE,
LAW BOOKSELLERS AND PUBLISHERS,
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—
1829.



**John Murray & Sons,
21, Strand, London, W.C.**

P R E F A C E

TO THE

FOURTEENTH EDITION.

“ THE Book (says the late Sir Samuel
“ Toller) of the most distinguished merit on
“ this subject is that which is entitled ‘ The
“ Office of Executor ;’ and which, although
“ it bears the name of Thomas Wentworth,
“ is now generally ascribed to Mr. Justice
“ Dodderidge. It was first published ano-
“ nymously in the year 1641. To the third
“ edition, printed in the same year, was pre-
“ fixed for the first time the fictitious name
“ I have mentioned : the eighth edition ap-
“ peared in 1689, to which Chief Baron
“ Comyn in his ‘ Digest’ constantly refers.
“ In 1703 the ninth edition was published,
“ with a Supplement by H. Curson. The

“ twelfth edition was published in 1762, with
“ references by a gentleman of the Inner
“ Temple ; and in 1774 the thirteenth and
“ last edition, by Mr. Serjeant Wilson. Of
“ the original work it is no undue praise
“ to assert that it is worthy the pen of so
“ learned an author. It is calculated to en-
“ gage the reader, and contains very sound
“ principles and authentic information ; at
“ the same time it must be confessed that
“ it is often uncouth and sometimes obscure
“ in its language, altogether inartificial in its
“ method, and of necessity defective in re-
“ gard to later adjudications, which at law
“ are numerous and important, and in equity
“ constitute a new system. It is also silent
“ respecting the office of an Administrator ;
“ nor is it much indebted to its several edi-
“ tors ; the Supplement is a mere collection
“ of cases, without order and without pre-
“ cision.”

In this panegyric and in these strictures
the opinions of the Profession generally unite;

PREFACE.

and it is therefore only necessary for the Editor of the present Edition to explain the nature and extent of his own undertaking. The original work is confessedly the basis of all the modern treatises on the same subject, and it is an authority still referred to on account of the "sound principles and authentic information" which it is admitted to contain. The Supplement of Curson, however deficient in order and precision, yet affords much valuable illustration and many pertinent authorities on those points which were obscurely or slightly touched upon or overlooked in the original work, forming no unworthy appendage to it, and with which it has in all subsequent editions been constantly published. It has been, therefore, attempted by the present Editor, to render that Supplement more useful by appending it in the form of notes, as a commentary on the original *; to this he has added those authori-

* This will be found in the notes subscribed (C), the Editor's being subscribed (E).

ties and principles which have been elicited or applied in the modern decisions. There are doubtless in this, as in every other original treatise, many instances of uncouth and, as we now consider, unseemly language, and of trifling inartificial and obscure reasoning; but these are not therefore to be wholly rejected, affording, as they often do, the best *indicia* of the state of manners and knowledge of the times. To these original authorities every sound inquirer must finally appeal, and it may be some amusement rather than offence, if, while tracing the progress and developement of principles, the course should occasionally be enlivened by the quaintness or peculiarities of the age.

4, *Inner Temple Lane,*

Jun. 23, 1829.

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THE OFFICE
OF
AN EXECUTOR.

THE things considerable touching Executors, Introduction.
may all, in effect, be reduced to these three
heads; *viz.*

Their *Being*.

Their *Having*.

Their *Doing*.

By the first, I intend their creation or constitution, with the incidents thereto (*a*). By the second, their interest, fruition or possession. By the third, their managing and execution of their office. This last was and is the thing principally

(*a*) It appears by sacred scripture, that wills and testaments were in use among the ancient Hebrews; for Abraham had made Eliezer his heir if he had died without issue male. Gen. 15. And Abraham, dismissing his other children with filial portions, he made his son Isaac his heir of all he had. Gen. 25. And Isaac, when Esau had sold his birth-right, appointed Jacob his heir and executor. Gen. 27. And Jacob likewise, by his will, gave to his son Joseph one portion above his brethren, which he took from the Amorite with his sword. Gen. xlviii. 22.—(C.)

in my intention, and the chief aim of this discourse; but necessarily it must have some ingredients, some concomitants, and some consequents: as he that travelleth from London to York to speak with J. S. must needs pass by and through other towns and villages, and speak with divers other persons in his journey and return. To come first to the first, therein we will consider these six things.

CHAP. I.

OF THE RELATION BETWEEN A WILL AND AN EXECUTOR.

1. *Whether an executor and a will be such relatives that one cannot be without the other; and therein of the several kinds of wills.*
2. *How and in what words an executor may be made and created.*
3. *How he may be in special manner, different from the general, fashioned, limited or qualified.*
4. *Who may make, or be made an executor, who not.*
5. *What one may give or bequeath by will, what not.*
6. *How a will or executor once made, may be unmade, and what shall amount thereto, viz. a revocation total or partial; what to new publication.*

Executor, what. AS to the first; the very name of executor (*b*) purporteth in general one to execute somewhat,

Definition of an executor.

(*b*) Executor, *ab exequendo*, is he that is appointed by any man in his last will and testament to have the disposing of all his substance, according to the contents of the said will. This executor is either particular or universal: particular, if this or that thing be committed to his charge; universal, if all. And this is in the place of him whom the civilians call

whom the execution of somewhat is committed or recommended. In one particular thereof an executor of a will must needs be such a one to whom the execution and performance of another will after his death is commended or committed; or who is constituted or authorized by the will-maker to do him that friendly office. Hence it followeth necessarily, that a will is the best place where an executor can be begotten or created; for where no will is, there can be no executor; and this is so conspicuous, and evidently of low capacity, that it needs no proof or citation. On the other side, though much be written in the name of a will, many legacies bequeathed, and many things appointed to be done (c), yet if no executor be named, there

What regard is to be paid to a man's declaration of his will where no executor is named.

no, and the law accounteth him one person with the house executor he is, as having all advantage of action against all men, that he had, so likewise being subject to another's action as far as himself was (1). This executor had its beginning in the civil law by the constitutions of the Romans, who first permitted those that thought good by wills to bestow any thing upon good and godly uses, and in whom they pleased to see the same performed; if they appointed none, then they ordained that the head of the place should have authority of course to effect it; now an executor is generally taken to be a person appointed by the testator to execute his last will and testament, and hath the property or interest in the testator's goods and estates, upon confidence to dispose them according to the directions as the law directs.—(C.)

Their beginning in the civil law.

Sw. Com. 185; Swinb. 7. 238; Finch, Pick. Ed. 167.—(C.)

Let Lord Hardwicke call the term *executor* a barbarous word. 3 Atk. 300.—(E.)

is no will : for these two be so relative and reciprocal, as that one cannot be without the other if no will, no executor ; if no executor, no (d) will. Yet here are two cautions to be affixed : 1. That a man's mind, will and intent touching the disposition of his goods being declared, although he want of naming an executor he die intestate, as administration is to be committed ; yet for that there is not only an inchoation or inception of testament, but so far a progression therein *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of goods (

(d) *Testamentum quasi testatio mentis*.—(C.)

(e) Although testators and executors are said to be *Co-lativi*, and that there is relation betwixt a will and an executor ; yet because there may be a will without naming executor, but no testament without an executor named ; an executor being appointed by testament, (which taken the largest sense is the same with a last will,) and hath commencement of his authority and interest thereby, it be requisite in the first place to declare, that although a testament and last will in some respects are both one thing, in other respects there is a diversity between them. For a last will being a general term agreeth with every several kind of last will or testament ; so testament being general taken *quasi testatio mentis*, differeth not from a last will ; any last will, be it a codicil, or other kind, may in that sense be termed a testament : but a testament taken strictly understood to be that particular kind of last will wherein executor is named. By which it appears, that every testament is a last will, but every last will is not a testament. In law most commonly *ultima voluntas in scriptis* is used where lands or tenements are devised, and *testamentum* when it concerneth chattels. Co. Litt. 111.

But as no last will is of any force *sine animo disponendi* no testament is of any force *sine animo testandi*.

therefore this mind and intention of the intestate being notified and made known to the judge, who is to commit administration, is usually annexed (as I take it) to the letters of administration; and meet so to be, for a direction for and to the administrator, as well as to the will, fully and perfectly made, but refused to be proved by the executor, which is usual. Another caution is, where a man seised of land in fee-simple dis-

Will of lands
good by statute.

Testamentum is *Testatio Mentis*, and favourably to be expounded according to the meaning of the testator, *In contractibus benigna, in testamentis benignior, in restitutionibus benignissima interpretatio facienda est*. There being divers wills or divers devises of one thing, the last will and last devise shall stand. 1 Inst. 112, a. b. This doctrine is, however, now exploded, for the devisees shall be joint-tenants where the same thing is devised to two persons in a will (2).

The maxim of common law is, that *Ultima Voluntas Testatoris est perimplenda secundum Veram intentionem suam*. And *Reipublicæ interest suprema hominum Testamenta rata haberi*. 1 Inst. 322, b.

Where the testator hath made two testaments, a former and a latter, and afterwards lying sick they are both brought unto him; and being desired to shew which he intends shall stand, and he saith, that the first should be his last will; or if he take that of the first date, and deliver it for his last will, then in such case that will shall stand, and the other shall be void. Perkins, s. 479; Mich. 44, E. 3, f. 33; Pacis Cons. p. 81.

Likewise if an executor be named in the first testament, and none in the second will, then the first testament shall stand, and the latter shall be added only by way of codicil. Barab. p. 7, s. 14, n. 5.—(C.)

(2) And where two inconsistent wills were executed, but it could not be determined which was the last, both were held void, and the heir was let in. 5 Br. P. C. 45. 1 P. Wms. 344, n. 1.—(E.)

poseth the same, or part thereof, by his will in writing, this standeth good for the whole or part, according to the difference of the tenure (f), al-

(f) It appeareth by Glanville, who was chief justice in the time of H. 2, l. 7, c. 1, f. 44, b. that every freeman, without the assent of his heir, might dispose of a reasonable part of his lands with his daughter in frank marriage, to some religious house to have divine prayers made for him in frank-almoigne, or to any servant in recompense of service, but all that must be in time of health; but if it were made in time of sickness, the consent and confirmation of the eldest son was requisite to it: and a man could not have given any to his youngest sons without consent of the eldest; but of land which he had purchased he might have given part to his youngest sons; and if he had no issue he might have given all to whom he pleased. And if lands are given to a man and his children, or issue, and he hath not any at the time of the devise, it is an estate tail, &c. And the statutes 32 & 34 H. 8, enabling the making of wills, were made to the great disadvantage of heirs at the common law. *Vide* 6 Rep. *Wylds's Case*; Cro. El. 525; Moor, 422; 1 Vent. 225; 2 Lev. 58; 3 Salk. 126.

All wills concerning lands shall be deemed (only as against creditors upon bonds, or other specialties, the executors, &c.) to be fraudulent and void. St. 3 & 4 W. & M. 14; *Wingate's Abr. Frauds*, 1, 2, &c. And such creditors may have actions of debt against the heirs and devisees jointly, &c. But devises of lands for payment of just debts or children's portions, other than the heir at law, in pursuance of marriage agreement in writing before marriage shall be in force. 3 & 4. W. & M. c. 14.

So the laws of the realm, and the judges, who are interpreters of the same, do favour wills, devises, and testaments, in yielding to them such a reasonable construction as they think might best agree with the minds of the dead.

Wills shall take effect although corporations, &c. be ~~no~~ rightly named, if it may be known what is meant, otherwise it is in deeds. 10 Rep. 57, *Chanc. of Oxford's Case*.

though no executor be named: so as the party dieth 32 H. 8, c. 1.
 intestate, and administration is to be committed, as
 touching his goods; and yet hath a will, as touch-
 ing his lands. This may seem strange: but the
 reason thereof is an Act of Parliament, enabling
 to dispose of land by will in writing, and for
 that land is not properly testamentary; neither Noy Max. 4.
 hath the executor (if any be) any thing to do
 or intermeddle therewith: and therefore is the
 making or not making of an executor, nothing
 pertinent to the validity or invalidity of this de-
 vise or disposition of lands by will (3). So as

The Lord Coke adviseth all who have lands to settle and
 assure them by advice of counsel in time of health, to which
 they may add such conditions or provisoes of revocations as
 they please. But if you please to devise lands by will,

Lord Coke's ad-
 vice to those
 who would de-
 vise lands by
 will.

1. Inform your counsel truly of the estates and tenures of
 your lands.
2. It is good to make it indented, and leave one part with
 a friend, lest it be suppressed.
3. Call credible witnesses to subscribe their names at time
 of publication.
4. If it may be, let it be written with one hand, and in one
 parchment or paper.
5. Let the hand and seal of the devisor be set to it. [The
 sealing it not essential. Godol. Orph. Leg. 6.]
6. If it be in several parts, let his hand and seal, and names
 of witnesses, be to each part.
7. If there be any interlining, or rasure, make a memoran-
 dum of it.
8. If you make any revocation of all, or part, let it be by
 writing, with good advice. 3 Rep. 56. *Butler and Baker's*
Case.—(C.)

(3) But the stat. 29 Car. 2, c. 3, requires that such will not
 only be in writing, but attested by three or four credible

though where there is not *testatio mentis*, th
is not *testamentum*; yet may there be the f

witnesses. Under which statute it has been ruled, tha
acknowledgment by the testator that his name is of
handwriting, is a sufficient signing upon the clauses 5 an
So the witnesses may subscribe separately, and at diffe
times. 3 Lev. 1. 86; Skin. 227; Pr. Ch. 184; Comy.
197; 2 P. Wms. 510; 3 Id. 254; 2 Ves. 454. 458; 1
jr. 11. So it is sufficient if the witnesses be in an adjoi
room, if the testator be in such a situation at the time
attesting that he might have seen the witnesses, or if he v
in his carriage at the time the attestation is made in
solicitor's office, if he could see what was going on in
office. In favour of attestation it is presumed, that if
might see, he did see. *Doe dem. Wright v. Manifold*, 1
& S. 294. But under a will of lands, only such pass as
testator was seised of at the time of making it. 2 Bl. C
378, 501; 4 Bac. Abr. 242; 1 P. Wms. 575; Ambl. 6
1 Ves. 141; 2 Ves. jr. 427, and *vid.* 1 Saund. R. 277, 1
The wife of an acting executor, who takes no beneficial
terest, is a credible witness within the statute. *Bettisc
Bromley*, 12 East R. 250. So an executor taking no b
ficial interest, but clothed with a power to sell for the
nefit of the testator's children. *Phipps v. Pitcher*, 1 Ta
220, and S. C. 1 Madd. R. 144. And the 25 Geo. 3, c
with reference both to its preamble as well as title, has b
held to extend only to wills of real estate, which by
Statute of Frauds require attestation, and that a lega
who is also subscribing witness, may therefore maintain a
for the subtraction of the legacy. *Brett v. Brett*, 3 Add
R. 210. Questioning the authority of *Lees v. Summers*
17 Ves. 510, as founded upon a mis-statement of the c
struction of the statute in the Ecclesiastical Courts. .
see Linton v. Blackburn, 3 Add. 213, *notis*. The statute
not extend to a devise of colonial lands. 2 P. Wms.
An estate *pur autre vie* being of a freehold nature can
pass by a will so executed. So 19, and 14 Geo. 2, c. 20

without the latter. Having now seen that bequests of legacies, without making of executors, doth not amount to a will; let us now consider whether the sole making of executors in the name of a will, without giving any legacy, or appointing any thing to be done by executors, whether, I say, this be or amount unto a will or not; since here upon the matter nothing is willed, and consequently nothing rests to be executed by the executors, whose office is, as hath been said, to execute the mind, will, and intent of their testator: and, *Ubi non est testatio mentis, non est testamentum*, say the canonists (g). For answer hereunto, confessing that indeed to be the office of an executor, I yet conceive confidently, that in the case above put there is a good will, and as a will it is to be proved, and approved for these reasons (h): first, for that the main and principal part of an executor's office, and that which concerns the soul of a testator (as our books speak) is the payment of his debts: now who knows not

The making an executor without more, amounts to a will.

And why it does so.

(g) Sum. Silv. fol. 32, b.—(C.)

(h) The constitution of an executor is the essence of a *testament*. Dr. Harris's Notes on Justin. Inst. 44, edit. 1756. A testament may be made in five words, viz. *LUCIUS TITIVS MIHI HÆRES ESTO*.—(C.)

So money given out of land is considered as a devise of realty, for it can only be raised by disposition or sale thereof. 1 Atk. 372.

But money covenanted to be laid out in lands, though it descend as a real estate, may yet be disposed of by the party entitled thereto as other personalty. 3 P. Wms. 221, and cases cited in n. c. Eq. C. Abr. 298.—(E.)

that the very making of an executor is the constituting of such a person who is to pay all debts? and for that cause and end is principally to have and enjoy all the goods and chattels of the testator and all sums of money to him owing. So What it implies. as the naming of *A.* and *B.* executors, is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator, and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the same. And if the law speak thus much, since *quod necessario subintelligitur non deest*, what need then the party express it in his will? If he had willed more than this, as to have given this or that in way of legacy, it had been needful for him so to have set down in his will; but there is no mere necessity that every man should give legacies in his will; the estates of many will not do more than pay their debts, nor oftentimes do so much; so as if they should give any legacies, it must be a dead and a void gift. And suppose a man hath much more, and intendeth all to his wife, brother or sister, or other friend, his debts being by such persons paid; since the very making of the party executor without any more amounteth to thus much, and effecteth this, what needeth then more words? *Frustra fit per plura quod fieri potest per pauciora*; as we often speak touching legal passages. It is needless to write four lines where two are sufficient. Nor is *testatio mentis* here wanting, since the testator hath made known who

shall have the administration of his goods for payment of his debts: and it is to be presumed he had no more special will, since he did not declare more, and left his executors farther to have and to do *prout lex postulat*. And who can say here is nothing to execute? Is the suing for and collecting of debts due to the testator, and paying of debts by him, nothing? Nay, it is, *in hoc negotio*, the *unum necessarium*. Besides, the making of an executor is a designment of a person to be the testator's assignee, to whom and by whom divers things may be feasible by virtue of covenants, bonds or other assurances; as after, where we come to show how the executor represents the person of the testator, will appear; also of one who, as our books often speak, is to dispose the testator's goods for the best advantage of his soul; but instead of that, (since as the tree falleth, so will it lie or rest,) I will say, as is most for the honour and reputation of the testator.

Of the kinds of Wills.

Now wills are of two kinds, or may be two ways made, *viz.* either by writing (4), or nuncupative, that is, by words not put in writing during the

(4) So where the will hath been lost, it may yet be proved by the evidence of two competent witnesses who have read and remember the contents, and can depone to the tenour thereof. 4 Bur. Eccl. L. 209.

Or destroyed in his lifetime without his knowledge. *Tredelyan v. Tredelyan*, 1 Phill. Eccl. R. 149.—(E.)

Testamentum
est duplex.

1. In scriptis,
2. Nuncupati-
vum seu sine
scriptis.

Co. Lit. 111.

4 Hen 6, 10.

It it be written,
and brought to
and approved
by the testator
in his life, it is a
will in writing.

14 H 6, 5.

Vide 5 H. 5.

1 M. 15, and

16 Eliz.

testator's life (5); for after the testator's death this verbal will must be reduced to writing, and have the seal of the ordinary or judge spiritual thereto affixed: and then it is as effectual, and of good validity, as if it had been in writing in the testator's lifetime; and so doth the common law allow and approve thereof (i).

(i) In an *Ejectio firmæ* upon a trial at the bar the evidence was, that one Warner by his will in writing devised the land in question to Henry Etheringham, and the heirs male of his body, and bailed the writing to a certain person to keep, and fours after died; and about a fortnight after his death this writing was found gnawn all to pieces with rats; yet by the help of the pieces, and of his memory and other witnesses, caused it to be proved in the ecclesiastical court and the court demanded of the witnesses, whether a stranger that knew not the contents of the will before, by joining the pieces together could tell that the devise of the lands in question was to Etheringham, and the heirs male of his body; for they did agree, that if this clause could be made out, though by joining of the pieces, it were a good will. But the witnesses said, a stranger could not make out the clause. Whereupon the court directed the jury, that if they found that the will was gnawn before the death of the testator, then it was for the plaintiff; if after, for the defendant. Select Cases 2. *Etheringham v. Etheringham*.—(C.)

(5) There is another kind of wills to be taken notice of, where the taking effect or not as a will depends upon some contingency; these have no effect, and are actually void where the event upon which the intention of the Testator grounded does not happen. *Parsons v. Lane*, 1 Ves. 15. And a mutual or conjoint will has been refused probate, an instrument unknown to the testamentary law of this country, (*Hobson v. Blackbourn*,) although perhaps it might raise a trust. 2 Harg. Jur. Ex. 101; 3 Ves. 403; 7 T. R. 131; 1 Add. 274.—(E.)

I advise all to make wills by writing, and

ne cities and boroughs lands may pass as chattels by cupative: but in law most commonly *Ultima voluntas* is used where lands or tenements are devised and *ultum* when it concerneth chattels. And by the same rent may be devised not of lands or tenements. At law no lands or tenements were devisable by any and testament, nor ought to be transferred from one, but by solemn livery of seisin, matter of record, ient writing; but by certain customs in some boroughs visable. 1 Inst. 111, 112; 2 Inst. 7.

ow by statutes 32 & 34 H. 8, and 12 Car. 2, which all tenures into plain and common socage, all lands ements are devisable by will in writing of the tenant mple, whereby the common law is altered. And on many difficult questions, and most commonly dis- n of heirs, do arise and happen (6). 1 Inst. 111; 67; 2 Jones, 210; 2 Mod. 315; 2 Vern. 469. The burteen is now allowed in Chancery.—(C.)

custom of a city or borough concerning the devise of , *Quod liceat unicuique civi sive burgensi, &c. Ejus- tatis sive burgi tenementa sua in eadem civitate sive i testamento suo in ultima voluntate sua tanquam cat- i legare cuicunque voluerit, &c.* 1 Inst. 111, a. Cus- a manor to devise copyhold without any surrender. t. 124. Lands devisable in London by the custom. t. 515.

nfant, at the age of eighteen years, or as some say n, may make this testament, and constitute executors goods and chattels. 1 Inst. 89, b.—(C.)

Copyholds not being of socage tenure (Co. Litt. 111,) are not therefore within the statute: but as a de- them operates as a declaration of a trust, which is by nute required to be in writing, no nuncupative dispo- can now be made of such estates. Co. Litt. 114, b. n. Atk. 37; 2 Vern. 598; 12 Ves. J. 429. If customary lds require no surrender to pass them, they are not the statute. Ambl. 299.—(E.)

The Statute of
32 H. 8. is, that
every person,
&c. may by will
in writing, &c.

not to leave them to the doubtful fidelity or slippery memory of witnesses. For, as of leases parol hath been said, that they be leases perjured or of perjury; so of wills parol may be feared. Besides, many times a man doth speak and declare this or that part of his will, which his wife, child or friend dissuading, he letteth that purpose and part of his will to fall, and departs from it; yet witnesses, wishing it to stand, will perhaps affirm it as part of the will. As for a will-gift, and disposition of land of inheritance, if it be not fully written before the death of the testator, or done so far (at least) as concerns the disposition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and chattels it may (7). Yet if it be written before the death of the testator, if it be never

(7) But it seems that if by reason of any omission of signature or attestation, which the testator evidently contemplated as necessary to the completion of his will, a fair presumption may be raised either of an intention altogether abandoned or continuing ambulatory, the instrument may be ineffectual even as to personal property. *Matthews v. Warner*, 4 Ves. jun. 186; 5 Ves. jun. 23 & 644; 9 Ves. jun. 249; 1 Meri. R. 503; *Scott v. Rhodes*, 1 Phill. Eccl. R. 12. And on the other hand, this presumption may be repelled by evidence that such completion was prevented by sudden death or sickness, or that the party when in *extremis* acknowledged it to be his last will and testament. *Baillie v. Mitchell*, in Prerog. C. 1805; (*Corp v. Corp*, ib. 1793; *Hog v. Larkley*, ib. 1789; *Markwick v. Taylor*, ib. 1722; *Shergold v. Shergold*, ib. 1714, cited in *Thorold v. Thorold*, 1 Phill. Eccl. R. 12) *Greene v. Prowde*, 1 Mad. R. 117; and *Rigden v. Vallier*, 2 Ves. 252.—(E.)

brought to him, or read to him after the writing thereof, it is good enough; and that not only for land, as the case resolved in King Edward VI. his time was, but also for goods and chattels, so as there be an executor named. But whether shall we say this is a will nuncupative, or in writing? And surely I think that this is a will in writing, and not only verbal, though it want subscribing; for we know that many cannot write their names, but only marks, and what is that? nay, suppose one wants hands, and cannot write so much as his name; yet doubtless this man may make a will in writing, it being written by his direction, as his will which he dictated: nor is the subscribing of the name of the maker any essential part of a deed, and less of a will, which needs not sealing, as a deed doth. Now put we the case on the other side, that many bequests or legacies be named in a will, and many things expressed to be done, and no executor is named in the writing, only by word of mouth *A.* and *B.* be named executors: this I think confidently is no will in writing, but nuncupative only; for that one essential part of the will, viz. making of executors is wanting in the writing. Nay, the appointing of him executor who is named in a note left with *A. B.* is no sufficient making of an executor, saith the Summist (8).

6 Ed. 6.
Dyer 32.

It is a good will
of lands within
the said Act
though not sub-
scribed by de-
visor.
1 Sid. 315. 326
But vide 29
Car. 2. c. 3.

(8) One that is blind may make a nuncupative testament, by declaring his will before a sufficient number of witnesses, but he cannot make his testament in writing, unless the same be read before witnesses and then acknowledged by him to be his last will and testament; for if he should acknowledge
a writing

But the number required by the statute of frauds to such will is but three, 29 Car. 2, c. 3. Tit. de Test. Sum. Sil. f. 443. b. If he survive and live a long time, not causing it to be writ or attested by witnesses, he thinks it should not stand as his will. *Id supra* § 444. b.

And of such nuncupative wills Mr. Perkins reasonably saith, that it properly hath place when one, suddenly taken with sickness violent, dares not stay the writing of his will, for fear of prevention by death (*k*); and therefore prays his curate and

(*k*) If a man be so extreme sick that he is almost at the point of death and can scarce speak, yet if he be of good understanding and sound mind, as may appear by his gestures and sensible speeches, in such case he may make his testament, so as it come of his own accord, and not at the earnest request or importunity of his wife or some covetous person who expects benefit of the same. See Swinb. p. 2. s. 25.

If the friends of such a sick man, or any other persons, do without his knowledge prepare a will in writing, and bring it to him, and read it, and ask him if that shall stand for his testament, and he answers yes, and immediately after dieth; in this case such testament is not good, unless the testator had first uttered his mind to the writer or indicter thereof, or had requested them to write his will; or unless the testator, being of perfect mind and memory, had by plain and express words, or other apparent conjectures, confirmed the same, and not only by answering yea. Swinb. p. 2. s. 25, n. 11.—(C.)

a writing for his last will, and do not hear it read, this will not make it amount to a will in writing. Powell's Swinb. p. 2. s. 11. and n. 1, 2.

But see a case where it was held not to be necessary to the validity of such will that it should be read over to him in the presence of the attesting witnesses, there being no imputation of fraud. *Longchamp v. Fish*, 2 New. R. 415.

A will taken down from the oral dictation of the party, though neither signed nor attested, is yet held to be a will in writing within the Statute of Frauds, and a compliance with the terms of a surrender directed to be made to such uses as should be limited by a last will in writing. *De d. Cook v. Danvers*, 7 East R. 299, &c.—(E.)

ers to witness what his will is. To this will : written there must be seven witnesses, and :h as come not by chance, but are especially led for that purpose, saith the Summist (1).

1) And by the Stat. 29 Car. 2, c. 3, s. 23, no nuncupative l shall stand good where the property thereby disposed of eeds 30 £., unless it be proved by the oaths of three cre- de witnesses at least who were present at the time of such ng made, and also that the party at the time of pronouncing : same testified that such was his will, or to that effect, and t it was made in the last sickness of the deceased, in his elling-house, or where he had been resident for the space ten days or more, (except when taken in sickness whilst went and dying before his return); nor can any such nun- cupative will be proved unless the testimony, or substance reof, shall have been committed to writing within six days herthe making. Vide *Miller v. Miller*, 3 P. Wms. 356.

No probate is allowed by the Ecclesiastical Court of such ill until after the expiration of fourteen days from the death of the testator, nor unless process hath been first issued to call in the widow or next of kin to contest the same if they think proper. And as to the strictness of proof required, both of the *factum* as of the *animus testandi*, see 2 Phill. 190. 194, and 1 Add. 389.

Soldiers are, however, still exempt from the provisions of this act, and may make nuncupative wills without the formalities prescribed. The wills of seamen are regulated by particular statutes, 26 Geo. 3, c. 63, and 32 Geo. 3, c. 34, which provisions have been extended, by c. 67, to seamen serving or who may have served in any of His Majesty's ships, and who are resident in Ireland. By these enactments it is provided, that no will of any such person, whereby any wages, pay, prize-money, or allowance is bequeathed, shall be valid unless, if made whilst the party is in service, it be signed before and attested by the then commanding officer and one of the signing officers of the ship to which the party belongs, and also specify the number of the party making it in the

ship's books, a full description of the residence, profession, or business, the date and place where made; or signed by the agent of hospitals for sick or wounded if the party be in one at the time; or if discharged from service, and within the bills of mortality, to be attested by the officer appointed by the treasurer of the navy to inspect wills; or if made at any other place, by the minister and churchwardens (or if in Scotland by the minister and elders) of the parish wherein such seaman, &c. shall reside. When the will shall have been so attested and executed, it is required to be transmitted, with other returns, by such commander, agent, inspecting officer, minister, &c., addressed to the treasurer or paymaster of the navy, at the Navy Office, London, to be there duly registered. If the treasurer or paymaster see any ground to doubt the authenticity of the will so transmitted he is empowered to enter his *caveat* against it, which will prevent any money being received under it; if there be no cause of suspicion he is directed to affix the stamp of his office thereto, and give a check in lieu thereof, admitting the receipt of such will and its leading contents, and instructing the party holding it to return such check on the death of the testator, filling up the blanks with the signatures of two respectable housekeepers of the place where the executor resides, attesting his identity and inhabitancy in such parish; another blank for the attestation by the minister and two of the churchwardens or elders, certifying that such housekeepers are resident and of good repute within the parish. Such check must also express that when the testator dies, after having quitted the service, a certificate of burial, or some authentic proof of his death, must be sent to the office, and that such executor do nominate some proctor to obtain probate, and that such certificates be sent under cover to such treasurer or paymaster as aforesaid. The inspector shall then mark on the will the amount of wages due, and forward the will to the proctor, and a letter to the minister, &c. (as the case may be,) informing them of the receipt of the check, &c. with a commission requiring him to swear the executor, and to return it, with a copy of the will to the pay-office, and informing the nearest receiver-general of the land-tax, collector of customs, excise, &c., who

be thereupon directed to pay such wages, &c ; and the proctor to whom such will and letter has been addressed is directed immediately to sue out such commission and forward the same, with a copy of the will and instructions for executing the same, and upon the commission so executed and returned to the inspector, and transmitted to him, to sue out and procure probate forthwith. By the Act such proctor is liable to a penalty of 50*l.* for taking more than the fees specified therein; and if he aid in procuring probate of a will or letters of administration for the purpose of enabling any person to receive such wages, &c. otherwise than is prescribed by the Act, every such proctor or other officer shall forfeit 500*l.* and for ever after be incapable of acting in any capacity in any ecclesiastical court in Great Britain.—(E.)

What shall amount to a making one Executor, or what words are requisite thereunto.

HAVING before made it to appear, that the being of an executor is an essential part of a will, and so *de esse*, and not *de bene esse* only, of a will and testament; let us now see, first by what words an executor may be made (a): secondly, *de modo*, in

See Cro. El. 43.

(a) Executor, is when a man makes his testament and last will, and therein nameth the person that shall execute his testament, that is his executor; and is as much in the civil law as *heres designatus* or *testamentarius*, as to debts, goods and chattels. And such an executor shall have an action against every debtor of his testator: and if the executor hath assets, every one to whom the testator was indebted shall have an action against him, if he have an obligation or specialty; but in every case where the testator might wage his law, no action lies against the executor. *Terminis del Ley.* *verb* Executor. There are three kinds of executors: the first appointed by law, and therefore called

A man may be executor, though not expressly named so, by implication. If A. B. be made executor, and to him and D. some goods are devised to be disposed for his soul, D. is by this an executor for these.
 39 H. 6.
 Dyer, 90.
 M. 15 & 16 El.
 21 H. 6, 6, 7.

what manner it may be done, how the power authority of executors may be limited and directed. As to the first, though one do expressly name or appoint any to be executor; yet if by word or circumlocution he recommend or commit to one or more the charge and office which pertaineth to an executor, it amounteth to as much as ordaining or constituting of him or them executors: as if he declare by his will that he shall have his goods after his death to pay his debts, and otherwise to dispose at his pleasure to that effect; by this is *A. B.* made executor, as was conceived by the judges in the late Queen's time. And long before that it was held, that one do will only that *A. B.* shall have the administration of goods, he is thereby made executor, yea, in the said late Queen's time, one do devise divers legacies, and then appointing that his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his will; by this, as was held more, was she an executor, as was held by the justices, viz. Manwood, Harper and Mourant, in the Lord Dyer's absence. And so also when an infant was made executor, and *A.* and *B.* over

lawful, as the bishop or ordinary; the second appointed by the testator, and therefore called *testamentary*; the third appointed by the bishop or ordinary, and called *datative* as an administrator.—(C.)

(a) I will that *W.* shall be my administrator, to have administration of my goods with *N.* my executor. *W.* and *N.* are joint executors. 21 H. 6, 6.—(C.)

in this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant; this were they held to be executors in the mean time. (a) And if *A.* be made executor, and the executor after in his will expreseth that *B.* shall administer also with him, and in aid of him; here is an executor as well as *A.* and if *A.* refuse, alone may prove the will as executor, notwithstanding it be only said, he shall administer with and in aid of him. Thus many ways, and by various words of implication, one may be made executor, although not expressly so named by the testator. But if *A.* be made an executor, and *B.* a coadjutor, without more, he is not by this an executor with *A.* as in King Hen. VI. his time is held: nor hath such coadjutor or overseer power to administer, or intermeddle otherwise than to counsel, persuade and advise; yet think he may, and in conscience should so do. And if that will not prevail to rectify negligence and miscarriages in executors, he shall well perform the trust reposed in him, if he complain in the spiritual court or court of conscience: and it is soon I think that so doing upon just cause, his charges be borne out of the testator's estate, or the executor's purse, who otherwise would not be borne.

The office of a
coadjutor.

21 H. 6, 6.
24 Ed. 3.
F. Exec. 121.
29 Ed. 3, 39.

(a) And where the intention to appoint is clear according to the tenor, he is entitled to be joined in the probate. *Trust v. Leslie*, 3 Phill. 116.—(E.)

How an Executor, or his executorship, may be limited or qualified in special manner different from the general.

Now let us see how this making of an executor may be specially qualified. And first, the time may be limited when he shall first begin to be executor; and that either certainly, or with some contingency. Secondly, the creation may be conditional. Thirdly, it may be partial or dividedly, and not entirely.

As to the first, one may appoint *J. S.* to be his executor a year or more time after his death; this is good (a). So also if *A.* appoint *B.* his son

(a) If the testator make *A. B.* executor after the expiration of five years after his death, or he doth make *A. B.* executor for and during five years after his death, this assignation is lawful, and the ordinary may commit the administration of the deceased's goods in the mean time to the next of kin; during which time the act of the administrator is good, and cannot be avoided by the executor afterwards; and the ordinary may also commit the administration of the deceased's goods unadministered by the executor after the expiration of the time of the executorship, where *A. B.* is appointed executor but for a time. (1) Pow. Swinb. p. 4, s. 17.—(C.)

(1) So an appointment of one to be his executor during the minority of his son, or the widowhood of his wife. 3 Bos. Abr. 28; 11 Vin. Abr. 136; 3 Atk. 180; Show, P. C. 54 4 Ves. jun. 72.

And where one is appointed executor for a time and another after that period, and the first prove the will, the second may act without another probate. 11 Vin. Abr. 56; Ch. 265.—(E.)

his executor when he shall come to full age and in the mean time he dieth intestate. one may appoint the executor of *A.* to be executor: and then if he die before *A.* he shall continue executor until *A.* die. This creation may also be conditional, and the condition may either be antecedent or subsequent (*a*). In the time of King

Certainly, contingently. Conditionally on condition precedent or subsequent. Greysbroke and Fox, Plowd. *A.* and *B.* made executors; but not *B.* to intermeddle during the life of *A.* and good. 32 Hen. 8. Bro. 155. 3 H. 6, fo. 6.

as there are divers words which make a conditional bequest, so there are divers sorts and divisions of conditions hereof some unnecessary, some impossible, some possible and indifferent: when the condition is extreme, that is to say, when the condition is such that it renders the bequest either unnecessary or impossible, such a condition binds not the executor or legatary, but that he may be released from the executorship, or recover the legacy, as if the condition had not been at all expressed. Pow. Swinb. p. 4, s. 6, n. 2.

When the condition is not extreme, but indifferent or possible, then it must first be fulfilled before the executor be released, or the legatary recover his legacy; but there are several variations to both these rules. Swinb. p. 4, s. 6, n. 4. If the testator make *A. B.* his executor or give him 100*l.* and his son dies, here the executor or legatary cannot obtain the executorship or legacy till such a thing happen, but until the event of the condition. *Ib.*

If the testator make *A. B.* his executor, or give him 100*l.* and he marries his, the testator's, daughter, supposing her to be living, whereas she is dead; in this case though the condition is impossible, yet because the testator did think her to be living and therefore the condition possible, *A. B.* in this case may be executor, nor obtain the legacy; or if the daughter be living, but died before marriage, in such case it is the same; but if she were living, and afterwards did refuse to marry, yet notwithstanding *A. B.* might be admitted to the executorship, or obtain the legacy. Pow. Swinb. p. 4, s. 6, n. 4, 15.

And if the testator's daughter were willing afterwards to

Hen. VI. one did name *A.* and *B.* his executors,

marry with *A. B.* before he have obtained the executorship or legacy, and then he refuseth her; in this case he ought not to be admitted to the executorship or obtain the legacy, unless after her refusal at first, and before her willingness, he be married to another woman, or have obtained the executorship or legacy, and is possessed thereof; for then her repentance comes too late. Pow. Swinb. p. 4, s. 10.

Also if the testator make *A. B.* his executor, or give him 100*l.* if he marry his daughter, and he refuses to marry her; here he cannot be admitted to the executorship, or obtain the legacy, although afterwards he be willing to marry her, and then she will not marry him; unless that at such time when he refused he were not of sufficient age to marry: for his dissent at that time when he could not consent doth not hinder him, nor is it a breach of the condition. Pow. Swinb. p. 4, s. 8.

If one make *A. B.* his executor, or give him 100*l.* if he erect a monument within three days after the testator's death; in this case, if the executor or legatary do perform the same with as much speed as is possible, it is sufficient though it was not done within three days. Pow. Swinb. p. 4, s. 6, n. 11.

If the testator shall charge his executor to whom he hath given all the residue of his goods, that he do some impossible act, or commit parricide, to pay then to *A. B.* 100*l.*; in this case he is not bound to the performance, for such legacy to *A. B.* is void. Pow. Swinb. p. 4, s. 6, n. 12.

Where the testator makes an executor, or gives 100*l.* if he pay 10*l.* to *C. D.* before a certain time, within which time *C. D.* dieth; and then he payeth the 10*l.* within the time to the executor or administrator of *C. D.*: in this case, because he did not pay the 10*l.* to *C. D.* himself, he cannot be executor, nor obtain the legacy. Pow. Swinb. p. 4, s. 7.

But if I be made executor, or 100*l.* is bequeathed to me if I pay to the testator's son (being an infant) 10*l.*; in this case, if I pay it to the child's tutor, it is a sufficient performance of the condition. *Ibid.*

and if they would not take it upon them, then

If the testator makes his wife executrix, or gives her 100*l.* if she abideth with his children; in this case, if she enter into bond to perform the condition, or else to make restitution, she may then be admitted to the executorship, or obtain the legacy. Pow. Swinb. p. 4, s. 9.

Also if the testator make thee executor, or give thee 100*l.*, if thou never play at cards or dice, or if thou never wilt be bound for any person; in such case, entering into sufficient bonds to perform the condition, or else to make restitution, thou mayest then be admitted to the executorship, or obtain the legacy. *Ibid.*

Those conditions which do impugn and hinder that liberty, which every testator ought to have by the law in the making of his will, are accounted unlawful. Therefore if the testator makes thee his executor, or gives thee 100*l.*, if thou shalt make him thy executor, or give him 100*l.* in thy testament; or if the testator makes thee executor, or gives thee 100*l.* if *A. B.* will; or if the testator make such a person executor, or give him 100*l.* whom thou wilt appoint; in these cases, though thou name one to be executor, or that *A. B.* will that thou be executor, or have the legacy; yet thou shalt not be admitted to the executorship, nor have the legacy, because by such means that free liberty which every testator ought to have in the making of his testament, might be taken from him, and he deprived of that privilege; therefore such dispositions are said to be capacious. *Ibid.*, p. 4, s. 11.

If the testator makes *A. B.* executor, or gives him 100*l.* if he never marry, or if he marry according to the appointment or consent of some other person; the first of these conditions is unlawful, because it wholly forbids marriage; and the second is unlawful, because it is referred to another person to make choice for him, who perhaps may choose such a person as is very unfit for *A. B.* to marry with. Therefore, in the first case, he may be admitted to the exe-

C. and *D.* should be his executors, and *A.* an

cutorship, or obtain the legacy, as if no such condition had been; and, in the second case, *A. B.* may make choice of woman himself (without the appointment of the other person) and marry her, and then he may be admitted to the executorship, or obtain the legacy, but not before marrying. *Ibid*, s. 12. By the civil law a devise on condition not to marry without consent, is void, though there be a limitation over; for there the maxim is *Matrimonium esse liberum* but it is otherwise in our law, for such condition is good and there shall be no relief, if there be a limitation over otherwise it is if only *in terrorem*. But a devise not to marry at all, or not to marry one of such a profession, is void in our law. 1 Vern. 20; 1 Chan. Ca. 22; 2 Chan. Rep. 2; Nel. Chan. Rep. 145; 2 Vern. 293; 2 Chan. Rep. 9; 2 Vern. 357; see 1 Wilson 130. 185, and 3 Atk. 330. 36 touching devises upon condition, and *in terrorem*.

But if the testator make an executor, or give him 100 if he do not marry before the age of 21 years; or if he do not marry a widow, or such a woman; or that he do not marry in such a place, or city: in these cases, if he break the condition, then he loseth all his interest as to the executorship or legacy. Pow. Swinb. p. 4, s. 12.

If the testator make his wife executrix, and if she will not or cannot be executrix, then he maketh his son executor; and if his son be not executor, then he maketh his sister executrix; and if she be not executrix, then he maketh his brother executor: in this case, the testator is said to make degrees of executors, and in this example there are four degrees of executors. And observe always, the executor in the first degree (as the wife is here) is said to be *instituted*, and the rest *substituted*. Pow. Swinb. p. 4. s. 14.

And note, that it is lawful for the testator to make many degrees of executors as he pleaseth, and he may substitute into the place of one executor either one or more

B. refused; and the question was, whether in suit against the debtors of the testator, *A.* and *B.* should join with *C.* and *D.* As where four executors be named, and two refuse, and the other two prove the will, yet all four must be named in suit against the testator's debtors, as was there admitted; but in the principal case it was resolved, that the suit should be only in the name of *C.* and *D.* for that the appointment of them executors if *A.* and *B.* did refuse, did

and into the place of many executors he may substitute one alone, or he may substitute to every executor one, or one of them to another. Pow. Swinb. p. 4, s. 19.

But if the testator do institute divers executors, substituting one or more to them, so long as any of them which was first instituted may be executor, the substitute is not to be admitted, unless the testator do appoint to every such executor a substitute; for then any one of these first instituted executors, not being able or refusing to be executor, his substitute is then to be admitted with the rest of the executors first instituted; whereas, otherwise, any of the first instituted executors, in the first degree, lawfully undertaking the executorship, all the substitutes are excluded, and, in such case, if the executor afterwards die intestate, then the administration is to be committed of the rest of the goods of the testator deceased, not administered by the executor, except in some special cases. Pow. Swinb. p. 4, s. 19.

If the testator make one executor, if he give 10*l.* to *A. B.* and if he do not, then he appointeth another to be executor; though the first refuse to give 10*l.* to *A. B.* yet cannot the other be executor, unless he give the 10*l.* to *A. B.* because this condition of giving expressed in the institution is understood to be repeated in the substitution. Pow. Swinb. *ibid.*—(C.)

imply that then they only should be executors; and here all four were never made, nor intended to be executors, but *A.* and *B.* upon a condition subsequent, that they should not refuse, and *C.* and *D.* upon a condition precedent, viz if *A.* and *B.* did refuse. It is usual to make one or more executors conditionally, that they put in security to pay legacies, or in general to perform the will; nor was it ever doubted, as I think, but that this was good: yet I should advise that such condition be plainly thus expressed, viz. either thus, that if *J. S.* do put in security, &c. by such a day, then he shall be executor, else not; or thus, viz. to make him executor conditionally, that before he do administer (funeral perhaps excepted) he shall put in such security; else perhaps, he being executor till the condition broken, in that mean time he may have disposed of all or most part of the testator's estate. In the late Queen's time there was a case remarkable to this purpose: one willed, that if his wife suffered *J. S.* to enjoy *Black-acre* (being belike part of her jointure) for three years, then she should be his executor, or else *A.* *B.* should; and the question was in the Common Pleas, whether presently, before the end of the three years, she were executor, or not till she suffered the land to be enjoyed three years; and it was held by all the judges but the Lord Anderson, that she was presently executor, until she should disturb *J. S.* &c. For

P. 33 EL.
Alice Francis,
her case.

upon that done, it was agreed, that the executorship would by virtue of the condition be transferred from the wife to *A. B.* But now during these three years might she have disposed of all the goods of her husband, yea, within one of these three years, and less time, and then have broken the condition, and have left to *A. B.* a dry executorship.

Now to the third point: One may divide his executor's power three ways, viz. really, locally, or temporally; really thus, he may make *A.* his executor for his plate and household stuff; *B.* for his sheep and cattle; *C.* for his leases and estates by extent; *D.* for his debts due unto him; and so divide the power and administration of his executors at his pleasure. He may divide them or their power locally, viz. *A.* for his goods in *Com. Buck.* *B.* for those in *Com. Ox.* and *C.* for those in *Com. Berks.* He may also divide them into time, viz. his wife or any other person to be executor during her life, or during the minority of his son, or so long as she continues widow, and after his son to be executor. So of like limitations or divisions, either for time, place or things, wherewith they shall intermeddle (1). Nay, doubtless one may be made executor for one particular thing only, as touching such a statute or bond, and no more; and thereof good use may be made, as I think thus: Many have bonds, statutes and recogni-

Dividedly.
19 H. 8, 3.
19 H. 8.
Dyer, 4.
Hil. 33 El. in
Com. Ban.

32 H. 8.
Bro. 115.

(1) 3 Phill. 424.

Quere, If not
assets in law,
when obtained.

ances, for warranty or enjoying of land, or freeing or saving harmless from incumbrances, in general or particular (*a*). Now he which hath these, selling the land, may by letter of attorney lawfully assign them to the party who buyeth land or lease: but this notwithstanding, the interest remains in him who selleth, and by his outlawry they may be forfeited, or by him released, any bond to the contrary notwithstanding; and if he die, the interest in law will be in and go to his executors, and in their names only suit or execution may be had or maintained.

Quere.

Now then if the vendor, besides assignment, make as to the statute, recognizance or obligation, only the vendee executor; by this the interest after the death of the party, will be in him actually and really to his more safety, since none but he can release or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quere*, if the vendee, his heirs and assigns, may be made executors, so as that security shall go to them one after another, without being renewed by making of executors? Thus if the party make no other executor, he dieth intestate as to the rest of his estate; and as to this specialty only shall have an executor, and must have a will proved; and

(*a*) A bond may be forfeited or released by the obligee, notwithstanding that he has assigned it over to another, and the legal interest therein will go to the executors of the obligee, whose names must be made use of.—(C.)

in case he doth make another will for his estate residue, there must be two wills proved. But in the other case, where by one only will one is executor for one part of the estate, and another for another, there being but one will to be proved, one proving of it sufficeth. And though in the premises of a will two be made executors jointly and equally; yet there may be a proviso that one shall not meddle during the other's life, so as they shall be executors successively, and not jointly. And thus also to other purposes aforesaid, a subsequent clause or proviso may make the partition and division of authority. But if the proviso or clause subsequent be merely contrary to the premises, it will be void; as where two were made executors, with a proviso or clause that one of them should not administer his goods, this was held void for repugnancy by Brudenel and Englefield, justices. But Fitzherbert, justice, was of mind that it was not void, nor utterly repugnant: for the other might join in suits, though not administer. And justice Shelly was of a third opinion different from all the rest, viz. that here was a repugnancy, but the last clause should control the premises, and so this one only should be executor.

How the premises of a will may be restrained by subsequent proviso.
32 H. 8.
Bro. Exec.

10 H. 8.
Dyer 3, 4.

Who may make an Executor.

SOME persons may be unable to make wills, and consequently executors, for that is all one; whosoever may make a will, may make an executor (*a*). There be nineteen several kinds of persons unable, as the Canonists say, to make wills; but with many of them we will not intermeddle, because we find no mention of them in our law. The persons principally and most usefully to be considered of by us are, either the defective in understanding, as infants, idiots,

(*a*) By the stat. 32 H. 8, c. 1, every one (except a woman covert, and infant under the age of one and twenty years, or a person *de non sane memorie*) may, by their last will and testament in writing, or other act lawfully executed in their life, give, dispose, will or devise, all such lands, tenements and hereditaments as they are solely seised of in fee-simple, or as much as of right in them is, of all such lands, tenements and hereditaments, as they are seised of in fee-simple in coparcenary, or in common, in fee-simple to any person or persons (except to bodies politic and corporate.) And two parts of three of all such lands, tenements or other hereditaments, as they hold in knights service, See 12 Car. 2, c. 2; 32 H. 8, c. 1; and 34 & 35 H. 8, c. 5. and see ss. 4 & 7; Co. 1 Inst. fol. 111, b.; Swinb. part 3, s. 3, 4; and Wing. Abr. of Stat. title Wills.

The king may make his testament, as it was assented in full parliament; and the executors of Hen. 4 refusing, the Archbishop of Canterbury was to grant administration of the same. 4 Inst. 335.—(C.)

lunatics, and the like (1); or defective in power (2) or interest, as women covert or married, persons outlawed, attainted, convict, or excommunicate. Some touch we will give of others; as aliens, corporations, villains, monks and friers. As for infants (3) and women covert, because much is to be said of each of them and their administration, we will forbear to treat of them in this place, but after will do it of each severally.

To begin with an idiot; naturally he is not able to make a will, as was resolved in the spiritual court, because he wants the use of reason to conceive what is fit for him to will; nor doth the common law oppose this, as I think.

Idiot.
3 Eliz.
Dyer 203, 204.
Shep. Touch.
402, 403, 404.
Swinb. part 2d,
Lunatic. Perk.
ch. 7. s. 479.

A lunatic having *lucida intervalla*, that is, some seasons of enjoying his right mind and freedom from his lunacy, may in those times of his right

(1) The grounds of incapacity are three: the want of sufficient legal discretion, of liberty or free-will, and that disability which is brought on by the criminal conduct of the party. 2 Bl. Com. 496.

(2) Though a man hath sworn not to make a will, yet, notwithstanding, he may lawfully make one; and if he hath made one, and sworn not to revoke it, yet he may afterwards make another and revoke the first; but then it is convenient that he revoke his oath also, and say, "I make this my last will and testament, notwithstanding my former testament, with the oath contained therein not to revoke the same." P. Swinb. p. 2, f. 24; 8 Co. 82.

(3) But though the will of an infant made whilst under age would be inoperative under the statute to pass lands, yet, if re-executed by him when of proper age, it would be effectual. 1 Sid. 162.—(E.)

mind make a will and executors, else not; for even one by age or sickness become of *non sane memoriae* is unable to dispose of lands or goods. 4 Co. 60 (a.)

Born deaf and dumb.
Vide plus
Perk, 5, 6.
33 H. 8.

One deaf and dumb born may make a grant, saith Mr. Perk, if he hath understanding, which is hard, as he confesseth, consequently much more

And as he ought to be of good and sane memory at the disposing, so he ought to be when he revokes.
Cro. Jac. B. R. Cranvell v. Sanders, p. 417.

(a) By law it is not sufficient that the testator be of memory, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, (and that is such a memory which the law calleth *sane* and perfect memory (1). And upon such matter it was moved in the *Marquis of Winchester's Case*, in Coke's Reports, to have a prohibition out of the court of King's Bench generally, to prohibit all the proceedings in the Ecclesiastical Court, as well for legacies and bequests given by the said will of the said marquis to his reputed sons, or others, in the personalty, as for the lands; and the reason and ground of this motion was, that forasmuch as the will concerning the land, and the testament concerning the goods, are mixed together in one will, if the Ecclesiastical Court shall proceed concerning the testament of the goods, it should prevent and prejudice the trial in this court: for if he were of sane memory at the time of making the testament of the goods, he cannot but be of the same memory at the time of making the will of the lands. And the common law ought to determine what shall be said perfect memory at the time of making the will of the land; and therefore the prohibition should be general, *quod fuit concessum per totam curiam*. And in Hil. 38 & 39 Eliz. it was ruled accordingly, and that no consultation should be granted for any party till the matter were tried in that court. Coke's 6 Rep. 23, *Marquis of Winchester's Case*.—(C.)

(1) 1 Phill. Eccl. R. *White v. Driver*, n. 84; and *Cleake v. Cartwright*, *ibid.* 90; and 1 Dow. R. Parl. 178.

a will; but in the time of King Henry 8, it is left a demurrer, whether a deed by such be good or not.

Dyer, 55, 56, a.
Vide 26 E.3.63.
Lib. Intr. 396.
18 E. 5. 53.
Sed vide 2 Bl.
Com. 49.

If but mute, he may wage his law, and attorn by signs, and so perhaps by signs declare his will. 44 Ass. pl. 36.

Mute.
26 E. 3. 63.
So in effect,
44 Ass. p. 30.
P. 31. Eliz.

An alien may make or be an executor, so as he be not an alien enemy (1), for such cannot sue, as in the late Queen's time was held: but there the doubt was, whether a subject of Spain were at the time to be held an enemy, no war being proclaimed between the kingdoms, though hostilities exercised (a.)

Alien not
enemy.
Pascalia de
Fountain's
Case.

As for persons attainted, convicted or outlawed, it will be said, that these can have no goods of their own, and consequently they can make no

Attainted, con-
victed or out-
lawed.

(a) By the custom of London, a foreigner as well as a citizen freeman may devise his tenements in London, which he hath in simple-fee to another in fee; but such devise may not be made in mortmain, unless by a citizen or freeman of the City. Dyer, 255, Pl. 3(1).—C.

(1) And if he hath license to reside here in time of war, he is equally capable of disposing of his personal estate by will as an *alien amy*. 1 Lutw. 34; 1 Woodes. 374. A lease for years of houses, for habitation, is a chattel interest which he may dispose of, so it be not made to an alien artificer which is still void under the Stat. 32 H. 8, c. 16. An agreement, which does not amount to a lease, is not within the Statute. 1 Saund. 7, n. 1; Co. Lit. 26, n. 7. By Stat. 5 Geo. 1, c. 27, subjects artificers quitting the kingdom to exercise or teach their trades, and not returning within six months after warning given them, are to be deemed aliens,

wills nor executors; and it is not to be denied that we find it pleaded sometimes by executor that their testators stood outlawed (1.) But first it is clear, that all and every of these may have goods as executors (a) to others, which neither are forfeited by attainder or outlawry, nor devested by marriage or villainage (b). Therefore as touch

(a) An administrator cannot devise those goods by which he hath as administrator to another person dying intestate, but administration thereof shall be committed to the next of kin to the first intestate, neither can an executor devise those goods by way of legacy which he hath as executor but he may make his testament, and appoint another executor who shall have the administration of the same goods to the use of the first testator. P. Swinb. part 3, s. 6; Bro. tit. Ad. pl. 7. Fitz. eod. tit. pl. 3.

(b) Where executors of a person outlawed may satisfy, and then take advantage of the king's pardon, but not before

and their wills as such inoperative: and it seems that alien enemies, residing abroad, or here without license, are altogether excluded. Ld. Raym. 282; Stra. 1082; 6 T. R. 225. And British subjects, artificers, residing abroad, after warning given to return, are to be deemed aliens, and are precisely disqualified by 5 Geo. 1, c. 27.

(1) The lands of persons convicted of treason or felony without benefit of clergy, become forfeited only on attainder but their goods and chattels on conviction. 4 Bl. Com. 387

Gavelkind lands are not forfeited by felony. 2 Bl. C. 8. 4 Id. 386; Lamb Par. 634. Persons *felo de se* forfeit the goods and chattels, but not lands, for there is no attainder. Plowd. 261; 4 Bac. Abr. 247; 3 Inst. 55.

So outlaws, so long as the outlawry subsists. Bac. Abr. t. Outlawry; 2 Hale P. C. 205; 1 Salk. 109; Fitzh. Abr. t. Descent. 16.—(E.)

ing them they may make testaments⁽¹⁾. And that all these sorts of persons may be executors, is also evident. So also touching villains, monks and friers (*a*), who can have no goods to their own uses. And that one attainted of felony may have an executor, appears by the case in the late Queen's time, wherein it was long debated, whether such an executor might maintain a writ of error or not, to reverse the attainder of the testator. And as for other outlawries, the plea thereof by the executors, that their testator was and died outlawed, proves not a nullity of the will or executorship; for then they might have pleaded that they were never executors. But it tends to this, that no goods did or could come to them for satisfaction of the debts, by reason of outlawry; yet it hath been delivered, not of old only in many books, but by some of late, that debts upon contract, where the defendant may wage his law, are not forfeited by outlawry, nor uncertain damages for trespass in battery, or false imprisonment, &c.

Villains, monks
and friers.

What shall not
be forfeited by
outlawry.
29 Ass. p. 63.
49 E. 3. 5.
50 Ass. p. 15.
33 H. 6. 27.
9 Eliz.
Dyer 26. 2.
contra.
Co. lib. 4, fo. 95.
19 H. 6. 47.
30 E. 3. 4.
16 E. 4. 7.
5 E. 3. 53.
6 H. 7.

the case of a subject, where executors shall have attaint, by Stat. 6 Ed. 6. Restitution upon Stat. 21 H. 8. Administrator shall have a Writ of Error upon Stat. 27 Eliz. and 6 Rep. 80; *Sir Ed. Philton's Case*.

(*a*) Bishops anciently could not make their wills, but now they may, paying the King their best horse, and five other gifts; for which a writ goes out of the Exchequer after their decease. Coke's 4 Inst. 338.—(C.)

(1) For it is a trust for the benefit of others, and his acts are in *auter droit*.—(E.)

Quere of breach of covenant. But goods taken away by a trespasser, may yet be forfeited by the attainder or outlawry of him from whom they are taken, for that property in right still appertained to him, and he might have taken them again wheresoever he found them; therefore the action for this shall not come to his executor; but for the other not forfeited it may.

Excommunicate
15 H. 7, f. 7.
Sum. Sylv.
tit. Testam.
Shep. Touch.
404.

Whether an excommunicated person be able to make a will or not, may be some doubt, since Keble denieth him ability to present to a church and in this very point anciently the opinion of canonists hath been negative, but more lately grew affirmative.

Who may be Executor, more.

42 E. 3. 1.
1 Inst. 134. a.
31 H. 6. 30.
A clerk attainted
may be an executor
by past.
Pascat. de Fountain.
But an alien enemy
cannot sue as
executor.
P. 31. Eliz.
3 Jac. c. 5.

AN excommunicate person cannot sue, that is proceed in suit as executor, till he be absolved there being danger of excommunication to all that converse with him; but this makes not a nullity of his executorship, nor overthrows the suit, but stays it only from proceeding until absolution. As for persons attainted or outlawed, we have before spoken affirmatively in way of proof that they may make executors, for continuation of the executorship; so of aliens and others before Recusants convicted at the time of the death of any testator are disabled to be his executors (1).

(1) The disability imposed in this respect by 3 Car. c. 2, s. 1, is removed by 31 Geo. 3, c. 32, which enables Catholics to act as executors, who shall make and subscribe a declaration

Whether corporations compound, or consisting of divers persons, may be made executors or not, I doubt. First, because they cannot be feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a will, or at least to take an oath as others do (1).

Quære, if corporations compound can be executors.

(a) So the King may be appointed executor; but he may in that case nominate trustees to execute for him, and auditors to whom they shall account. 4 Inst. 335. Bac. Abr. 5. And when the King is made executor, he doth appoint others to execute the same, (against whom such as have cause of suit may bring their action,) and appointeth others to take the account. Coke's 4 Inst. 335—(C.)

a declaration of their faith, the oaths of allegiance and abjuration. By 9 & 10 W. 3, c. 32, persons denying the Trinity or the Holy Scriptures, or the truths of Christianity, are disabled from being executors for the second offence. So persons undertaking offices without having complied with the requisites of the several statutes are thereby disqualified. 25 Car. 2, c. 2; 1 Geo. 1, st. 2, c. 13; 13 W. 3, c. 6, s. 6.—(E.)

(1) But it seems now settled that they may, inasmuch as they may appoint *syndics* to receive administration with the will annexed; (3 Bac. Abr. 5; Swinb. 5, s. 1; 11 Vin. Abr. 140;) and in the cases of such corporations as can take the oath required, the argument in the text does not apply. Godolph. 85.—(E.)

What a Man may give or dispose by his Will.

8 Vin. Abbr. 43.
pl. 23, 59. pl. 5.
11 Vin. Abbr.
267. pl. 6. 272.
pl. 4. 421 pl. 6.
Law of testa-
ments.
Plewd. Com.
325.

HAVING considered of the makers of executor by will, and of them so made; let us now consider what by this will may be disposed (*a*), given or bequeathed (*b*). And first, he who himself is a executor cannot by his will give or bequeath any other the goods, chattels, or credits he hat

(*a*) A man deviseth lands in London to his wife, upon condition, that if she marrieth, the lands shall remain to his son in tail, and for want of such issue, the remainder to the right heirs of the donor in tail. The wife taketh husband, and she and her husband occupieth the lands, he in the remainder dieth without heirs of his body. The right heirs of the donor shall have a special writ of *Ex gravi Querela*. Co. 10 Re *Mary Portington's Case*.

By custom of London a man may devise all his lands; but to his wife he can devise only for life.

The goods of a freeman cannot be devised; but the wife shall have one third part, and the children another third part, and the other third part shall be distributed or disposed for the good of his soul; and this is called the death's part. The City Law, p. 4. And may devise in mortmain.

(*b*) All manner of goods and chattels, real and personal, moveable and immoveable, may be devised by will or testament, except in some certain cases (1).—(C.)

(1) The disposition by will of stock in the public funds required by Stats. 33 Geo. 3. c. 28, s. 14; and 35 Geo. c. 14, s. 16, to be attested by two or more credible witnesses. But it seems that where it does not pass by such an effectual disposition, it falls into the undisposed residue in the executor's hands for the benefit of those who are entitled to the personalty. 7 Ves. jun. 452.—(E.)

as executor, the property not being altered; for that he hath not them properly as his own, or to his own use; only he may make a continuation of the executorship, and his executor shall have them as executor to the first testator, as was resolved by the judges of both benches in the late Queen's time. And if he be administrator, the bequest is then also void; nor then will they go to his executor, but to a new administrator; but on his deathbed he may give them by word or deed, though not by will. Next, if a man have debts owing to him, as many have much, it is considerable, whether by way of bequest in his will he can give away these to any from his executors. And doubtless he cannot effectually in law; they being not subject to assignment unto any, except the King. So as if he give such a debt to *A.* and such to *B.* yet must the suit for them be in the name of the executor: and so also the release or acquittance for them, and not in their own names to whom the bequest is. But when they be received, if there be no debts to pay, the executor ought to deliver them to the party to whom the bequest is, and thereunto may be compelled in court of conscience, or in the spiritual court (*a*). Therefore the case

Hil. 30 Eliz.

At any time in his life he may alter the property. So 48 E. 3. fol. 14, 15. Where the bequest was to one of the executors, it was held that the other executor might release it. If sufficient, otherwise to pay all one as if none, 48 E. 3. p. 14, 15. 11 Ed. 3. Fitz. Tit. Cond. 9. Where both stated jointly by one grant. Differences between joint tenants and in common holding by several grants. Another kind of tenants in common.

(a) If the testator make another man executor, then the legatary shall not enter into the whole estate of the deceased; but the executor proving the will is to enter, and may receive or sue for all the debts due to the testator, and stands also chargeable with the payment of the debts, and what remains is due to the universal legatary. P. Swinb. p. 7, s. 10.

If the testator bequeath to *A. B.* all his moveable goods;

Co. Lit. 185.
a. b. 192,
Lit. Sect. 287.
See 1 Wilson,
341.

of the bequeathing money payable upon a mortgage is in this manner to be understood to be good, and no otherwise, as I take it (a). He that is jointly with any other estated in lands or goods can give no part by his will, but all will survive; but by act in his life he may dispose of his part; and the assignee may dispose of his moiety by will, yea, though it be half a horse or ox, that cannot be divided (b). So of a lease of lands, or

here the legatary may recover all the testator's personal goods and cattle, both quick and dead, which either move themselves (as horses, sheep, oxen, swine, &c.) or can be moved by another, as household-stuff, plate, plough-geer, wains, carts, corn in barns or garner, and also corn growing on the ground. And such debts as were due to the testator, and did arise by reason of such moveable things, and for recovery whereof there lieth an action personal, do also belong to the legatary; but the legatary cannot sue for the same in his own name, if another man be made executor; but the executor must sue for the same, and after recovery, deliver the same to the legatary. Swinb. part 7, s. 10.

(a) Co. Lit. 182, Co. Lit. 185; Perkins, s. 500. Joint-tenants and in common, post.

(b) So where two men are jointly possessed of goods and chattels, real or personal, one of them cannot make his will, and bequeath his part to another; for when he dies his part goes to the survivor, and so it is in lands, tenements, and hereditaments. Cowel's Inst. 140.

One joint-tenant promised the other upon his death-bed that he would not take advantage of the survivorship, but suffer him to dispose of it by his will, by which he devised part for the payment of his debts, and the survivor was ordered to make the estate accordingly. Cary's Rep. 81, *Spring et ux' v. Upton*.

tithe, or grant of goods to two, *habendum* one moiety to the one, and the other moiety to the other; each may give his moiety by will. But if one be possessed or estated for years by lease, wardship, or extent, &c. in the right of his wife (*a*), or have the next avoidance of a church in her right, he cannot by will give or bequeath any of these; but, notwithstanding, they will remain unto his wife, upon his death: but yet his gift or grant of them taking effect in his life-time would bind his wife, and carry away his interest from her. If one be tenant for the lives of one or more others, (as oft-times men take leases for lives of younger persons than themselves,) this cannot be by will disposed of; for that it is no estate of inheritance. Therefore let the party look to convey it in his life-time, lest it go to an occupant, *viz.* him who first shall enter. If it be an estate in land, he must either make livery,

At this day
estate pur autre
vie is devisable
by Stat. 29 Car.
2, c. 3, s. 12.

A devise to two legatees equally; the devise is joint, and yet the intention prevents survivorship. Cases in Chancery, 239.—(C.)

¹ Wilson 341.

(*a*) *In jure uxoris.* The husband may in his life dispose of a term in trust for his wife, as well as if the legal estate was in her. 1 Vern. 7. 18; 2 Vern. 270. So if a term of years is created in trust to raise her a sum of money. Trin. 1703. between Walter and Saunders.

Also if the husband be possessed of a term or lease for years, in right of his wife, he cannot devise it by his will, but he may grant it away or dispose of it in his life-time; or if he make no disposition thereof, yet if he survive her, then it falls to him; and in such case, he may devise it by will.

¹ Inst. 254, b.—(C.)

Stat. Merton,
&c. 2. Viduus
possunt legare
tam de ritibus
quam de aliis,
&c. Quere, If
the trees may
be devised by
the stat. of wills,
without giving
the land itself.

have a bargain and sale enrolled, or covenant to stand seised to the use of his wife or some of his blood, or make a lease for years determinable upon those lives. Good, if it be by bargain and sale for years, if the thing be in lease, that without inrolment or attornment the rent may pass: else a bargain and sale may be made for month, or such like time, and then a release or grant of the reversion instead of livery and seisin. But if a man have a lease for ever so many years determinable upon life or lives, that is, if such or such live so long, (which unskilful person call a lease for lives,) this state may well enough be given and disposed by will, because it is but chattel (1). If a man be seized in fee or in tail of land having corn growing upon it, and by his will do give the corn, and die before severance this is a good bequest, because the corn should have gone to the executor. So it is also of a person touching his glebe, and a man seised in the right of his wife, or his own right but for life (b). But as for trees growing upon the

(a) If a woman tenant in dower sow her land, and afterwards marry, and the husband dies before severance of the corn; in this case it remains to her, and he cannot devise it; but if it had been sown after the marriage, he might have devised it. *Doctor and Student*, lib. 1, c. 20; *Co Litt.* 55. Tenant in dower may devise corn growing. 2 *Inst.* 81.—(C.)

(1) The distinction is between terms in gross, and those which are not so; the former are devisable like any other personality

ground, these can no otherwise be given by will, than as the land itself upon which they grow may be given; of which matter, as not pertaining to the office of executors, *viz.* how and in what manner land may be given by will, I intend not to treat in these discourses.

Of the revocation and countermand of Wills, and new publication.

HAVING considered of the making of wills and executors, let us, before we come to the probate, consider of revocation; for that may take away the force of a will rightly made. A will therefore having two parts, *viz.* inception, which is the making, and consummation, which is the death of the testator or maker of the will, there is power in him at any time before death to revoke or alter his will at his pleasure. Consider we therefore of revocations, and also of new publications or re-affirmance of wills, in whole or in part (*a*). As therefore a will may be made by

Omne testamentum morte consummatur. See the pleading of it by making a later will. L.b. Intra. f. 323, b. and 641, a.

(*a*) But how revocations now must be, vide 29 Car. 2, c. 3, s. 6.

personalty, but they can be only created by will executed under the statute, in respect of the realty out of which it is created, and of which it becomes a partial devise, (Co. Litt. 114, b. n. 3;) but when the term is vested in trustees to attend the inheritance, it can only pass by a will so executed as to pass the inheritance. 2 Atk. 72; 2 Wils. 329.—(E.)

be made nuncupatively or by word, and so by making a verbal will one may revoke a written

2 Wilson, 18.

2 Wilson 18.
contra.

Pleas, Rokesby, Justice, *de eadem Cur'* and John Powel, junior, one of the Barons of the Exchequer, Dr. Oxenden, and other civilians; where, for avoiding of the testimony of two witnesses to the will, were produced two records, by which they were found severally convict; the one, for publishing a libel; the other, for singing a song against the government, and both adjudged to the pillory. But no proof was that they were put into the pillory, but only the records produced. And after their examination in the Ecclesiastical Court, but before the sentence there, came the general pardon by which they were pardoned. And the question was here, whether their examination and testimony given in the Ecclesiastical Court should be admitted for evidence? And 1. It was admitted, that they being convict, and adjudged to the pillory at the time when they gave their testimony in the Ecclesiastical Court, the pardon afterwards doth not make their testimony good, if it were not good when it was first taken. 2. That the judgment of pillory made the infamy, although that they were not at any time put in the pillory. But 3. The great question of the case was, whether the conviction and judgment for these crimes shall make them infamous, and destroy their testimony, notwithstanding the judgment of the pillory? For it was said of the one part, that the books, as Britton, Co. 3, Inst. &c. which speak of the infamy by the judgment of the pillory, speak of the judgment of the pillory for such crimes which import deceit and fraud, as cheats, &c., and that it is from the nature of the crime that the infamy arises, and not from the judgment. To which it was answered, that it is the judgment upon which the infamy ariseth, and not from the nature of the crime. And if one be convict of cheating, yet he may be a witness if he hath not judgment of the pillory for it. Secondly, it is said, that pillory, although, it infer infamy by the common law, yet by the capital and civil law (by which they are to be adjudged in this case of a will),

will, it will thereupon follow, that one by word may express the alteration of his mind thus far, that the will by him formerly made shall not stand, but be revoked and annulled; and this will stand and be effectual, so as if he after die, without making any new will, or new publication, or reaffirmance of the former, he dieth intestate or without a will. As a will may be wholly revoked, so also in part. Hereabout a good resolution was in a Kentish case, where one Ryete by his will in writing did give some gavel-kind land to one Harrison, and five days before his death said in the presence of witnesses, that this gift should not stand, and that he would alter it when he came home; desiring them to bear witness of his revocation. Now before he came home he was killed by the said Harrison, who caused the will in writing to be proved, and after he was attainted and hanged for the murder, and his son by the custom of Kent (viz. the father to the bough, and the son to the plough), entered into the land. And this manner of revocation by

A will in writing
might be re-
voked by parol.

14 Eliz.
Dyer 310. b.

doth not import infamy, unless the cause for which they are adjudged be infamous; and to that the civilians seemed to agree. And after the council were withdrawn, for this cause only, as Rokesby and Powel afterwards said to Levinz, the matter not being infamous by the canon and civil law, the depositions of the witnesses were admitted for evidence, notwithstanding the judgment of the pillory, *Per tout le Court*: and the sentence in the prerogative court reversed, and the will sentenced to be good. Lev. p. 3, 426; *Chater & al. v. Hawkins*, Exor. Trin. 7 W. 3, before the court of delegates at Serjeant's-Inn, in Fleet-street.—(C.)

M. 28 & 29
Eliz. Co. lib.
4, fol. 60.
But for this
reason in that
case the mar-
riage was a
countermand.

7 H. 6, f. 13,
M. 38, 39.
Eliz. 2 Syd. 75.
Cro. El. 306.
Cro. Jac. 497.
Diversity where
words spoke in
the future, and
where in the
present tense,
Ow. 76.
Gouls. 33.
Cro. Car. 51.
3 Mod. 208,
207.
What words
made a revoca-
tion, Cro. Jac.
115, not with-
out express
words, and not
by words only
spoke by way
of discourse.

word only was held sufficient, although the will in writing was not cancelled, nor defaced. And the like resolution, for verbal revocation, is implied in the case of Forse and Hambling: where it being resolved, that a feme-covert, or married woman, by word countermanding and revoking her will formerly made, when she was a sole or unmarried woman, this was not effectual nor of force, by reason of her coverture taking away the freedom of her will; hereby it is implied, that another who hath freedom of will may by word sufficiently revoke a will in writing; and so was it since also admitted in the case between Sir Edward Montague and Jeofferies touching the will of Sir Jo. Jeofferies: but there a difference was conceived betwixt saying, *I will revoke my will* (which only expressed a purpose or intent, and therefore was no present revocation), and saying *I do revoke it*, or *it shall not stand*, or *my heir shall have my land*; which crossed the gift of it by the will. And as wills may be wholly or in part revoked; so may also the executorship of one or more of the executors, and yet the will may stand in all the other parts, so as there be any one executor or more unrevoked: but if all be revoked, then the whole will is revoked, because no will can stand without executors; and this revocation may be by word only, without being expressed in the will or any other writing. But I could wish all to express such revocation in the foot of the will, or that the name or names of the executor or executors so revoked be ex-

punged or blotted out of the will, and that this be done in the presence of some witnesses to testify the act and intent of the testator (1).

Again, revocations may be by act in law as well as in fact, or by direct and express terms; as in the said case of Montague and Jeofferies, where land being devised by will, and the devisor after making a feoffment, though there were some defect in the livery to make it effectual; or if he made a bargain and sale that was never enrolled, or granted the reversion, but no at-

Revocation by
act in law.
Vide 6 E. 6.
Dyer 74. & 3.
& 47. & M. 48.
2.

(1) The act of cancelling, being an equivocal act, in order to operate as a revocation, must be done with the intent to revoke, and not by mistake or accident. Cowp. 52. 812; 2 Vern. 741; Pr. Ch. 459; 1 P. Wms. 343. 346; 4 East. R. 419; 3 B. & P. 16. And when it is done by a subsequent will, that must expressly revoke the former, or apply to the same subject matter; and be clearly inconsistent with the former disposition. 1 P. Wms. 345, n; Cowp. 87; 7 Br. P. C. 344.

Hence a will revoked by a subsequent one, but not cancelled, was held to be republished by the cancelling the latter, the intent being apparent. 4 Burr. 2512; 3 Ch. R. 155; Com. R. 451; and see 2 Add. 116.

But a cancelling of a duplicate will, being in the custody of the testator, annuls both. Cowp. 54; 4 Burr. 2515; 2 Vern. 742; 2 P. Wms. 346.

The act of cancelling, as well as the circumstances under which it was done, will be very nicely looked into; a mutilation only, although it amount to a cancellation, will not operate to revive the prior will. *Moon v. Moon*, 1 Phill. Eccl. R. 375. 406.

Cancellings in pencil held merely evidence of being marked for future deliberation. 3 Phill. 321.—(E.)

torment had, so as the land passed not; yet in all these cases the will or gift of land stood revoked (a). But in case he had only covenanted that he would have made such an estate, and (1)

(a) So a will countermanded by a feoffment, and judgment given for the plaintiff, although the title which he made for himself were destroyed. 8 Rep. 93, *Frauncer's Case*.—(C.)

(1) A mere deed intended to operate as an appointment to uses, but ineffectually made, held sufficient to revoke. *Shove v. Pincke*, 5 Term. 124. So a deed of settlement, whereby the grantor parted with the whole estate devised, although he took back by the same instrument an estate consistent with the previous devise. *Goodtitle v. Otway*, 2 H. B. 516; 1 Bos. & P. 576; 7 Term. R. 399.

So a fine levied to such uses as should be limited by deed or will, and none is afterwards made, the will made before the fine is thereby revoked. *Doe v. Dilnot*, 2 New R. 401. So of a recovery subsequently suffered, even where the recovery, on account of a misnomer of one of the parties, only operated as an estoppel against the testator and others claiming under him. *Doe v. Llandaff*, 2 New R. 491.

But a subsequent will of after acquired lands, or a disposition not inconsistent with such previous will, is not a revocation thereof. *Thomas v. Evans*, 2 East. R. 488.

So a mere substitution of other trustees, only operates as a revocation *pro tanto*. *Skott v. Smith*, 4 East. R. 419. Or a striking out one of several devisees. *Larkins v. Larkins*, 3 Bos. & P. 16.

And a mere demise for a term is only a revocation for that term: 6 T. R. 710; 7 T. R. 399: *i. e.* the devisee takes the estate subject to the lease.

In equity the rule of revocation is founded altogether on the same grounds as those which are admitted at common law, and to the same extent where the subsequent devisees,

not done it; this was held to be no revocation.

And so by some, in case he do but make a lease, ¹ Rol. Abr. 615, pl. 3.

grants, &c., are only partial. 2 Ves. jun. 428. 595. 603. Ambl. 31; 3 Ves. jun. 650; 2 Vern. 679; 3 P. Wms. 169. 624. 436; 3 Wils. 6.

A mortgage therefore for a term is no revocation; and if it be in fee, as such act is considered at common law only in the light of a pledge for the debt, and that when discharged the estate reverts to the mortgagor unaltered, neither can the latter operate as a revocation; 6 Madd. 221. And a conveyance or charge for the payment of debts being analogous thereto, is no further an alteration of the estate than to let in the particular purpose for which the conveyance or charge was created. 2 Ves. jun. 428.

And a subsequent conveyance, where it only confirms the testator's right and intent, of which he had only an equitable estate before, is without either the rule or the principle, and the devisee acquires both the equitable and legal interest. 2 Vern. 679; 3 P. Wms. 169.

The revocations implied by operation of law, arise from acts which import an intention to revoke; thus, any the least alteration or new modelling the estate. 11 Mod. 170; 3 Atk 748. 803; 4 Burr. 1960; 1 Wils. 310; 2 Ves. jun. 431. 600; and 6 Ves. jun. 222. Secondly, imperfect conveyances, though nugatory; as in 3 Atk. 803; 7 Ves. 378; 3 P. Wms. 163; 3 Wils. 6.

And a mere covenant to convey the devised estate, as it may be enforced in equity, is sufficient; and even where the revocation is evidently opposed to the testator's intention. Ambl. 618. 653; 3 Atk. 803. 741; 2 P. Wms. 718; 2 Ves. jun. 431; Dick. R. 397. Even a disseizin has the same effect. 8 Ves. jun. 282. The same rule holds also as to leases for lives; 3 P. Wms. 170; and chattel leases, where specifically devised; Ambl. 571; 2 Atk. 597; 3 Atk. 174. 199; 1 Br. Ch. C. 261; 2 Br. Ch. C. 291; 1 P. Wms. 597; 2 Ves. 418; but not otherwise.

leaving the fee-simple as it was; but of *quære*; and if a difference may not be betwixt making a lease for years and a lease for which altereth the freehold. If a lease for two years be bequeathed to *J. S.*, and after the testator maketh a lease for fifteen years, reserving a rent; I take this to be no revocation of bequest: but if the testator, after this will made, take a new lease for a longer term, so as the former lease is surrendered in fact, or in law, this must needs be a revocation of the bequest, or at least an annulment thereof; and that though the bequest were generally of his lands, not mentioning the number of years; for which he now hath is another lease, and that which he had at the time of the making of the will. So if one give his black gelding by will, and after, before his death, he selleth and giveth away that horse, and buyeth another black one; this new gotten horse shall not pass by will, because it was not the testator's at the time of making his will. So also if the crop in a barn he bequeathed in October, and the party die till that time twelve months, having sold that crop

And vid. 2 Atk. 599.

And whenever such subsequent conveyance has induced or obtained by fraudulent means, it will not do the prior devise. 3 Barr. 1244; 3 Br. Ch. C. 156.

So where the testator made the second disposition under a mistake of facts, as the supposed death of the first devisee. 3 Ves. jun. 321. Or where the conveyance is void and operative. 2 Bing. 136.—(E.)

and inned a new, this later crop shall not pass by the will, and the former cannot (a).

Again, as revocation may be by alteration of the estate of the deviser in the land devised; so may it also be by alteration, in some case, of the state or quality of the person of the deviser (2).

(a) *Note.* The statute does not extend to implied revocations. 1 Rol. Abr. 615, pl. 6. See *Darley v. Darley*, 3 Wilson, Trin. 7 Geo. 3. Nor to personal estate. Doug, 35, 244, n, 2 (1).—(C.)

(1) Since the statute, the rule of implying the testator's intention to revoke a good existing will from any act which alters the nature of his estate, has been much infringed and altered; the subsequent act of the deviser to work a revocation must be complete, and actually effect such alteration. 5 Ves. jun. 656. 664. So we have seen the conveyance must alter or pass the whole estate, or the revocation will only be *pro tanto*. Cowp. 90, and supr.; 2 Eq. Ca. Abr. 418; 2 Vern. 720; Pr. Ch. 515.

In all cases of such revocations implied by operation of law, it seems fully settled that no parol declarations in favour of the will can be received in evidence to repel the presumption raised by such operation of law. *Goodtitle v. Otway*, 3 H. Bl. 516; 1 Ves. 440. 489.

This rule has, however, been doubted in the case of a revocation implied from marriage, and the birth of a posthumous child. 2 H. Bl. 592; 7 Ves. 353.—(E.)

(2) It is now an acknowledged rule, that marriage and the birth of a child, whether posthumous or otherwise, operate as a revocation of a will of lands. *Doe v. Lancashire*, 5 Term. R. 49. But either of these facts occurring singly are not sufficient. *Shepherd v. Shepherd*, 5 Term R. 49. and 51, n.

And if the will contemplates a provision for such events,

As if a woman sole make a will, and after take a husband, this, without any more, as is resolved in the said case of Forse and Hambling, doth work a revocation or annullation of the will (a); for that else it should be then irrevocable, since

(a) So the taking of husband and coverture at the time of her death, was a countermand of the will of the wife made before the coverture. Coke's 4 Rep. 61, *Forse and Hambling's Case*, and the same rule.—(C.)

they are no revocation. *Kennebel v. Scrafton*, 2 East. R. 530.

So where the will provided only for children by a former marriage, and the after-taken wife and her children were provided for by a settlement, it was held not to be a revocation. 7 Ves. jun. 348. But where the will provided for children then living, and with which his wife was then *enscint*, yet after-born children and a large increase of property, coupled with declarations of his, held to operate as a revocation. *Johnston v. Johnston*, 1 Phill. Eccl. R. 445.

So where a will was revoked by a deed of settlement, but was revived by a codicil made after the deed, and afterwards the party married and had children, yet held that the will was not thereby revoked, inasmuch as the will, settlement and codicil all contemplated those events. *Jackson v. Hurlock*, 2 Eden's Rep. 263. So in the case of a power. 1 Russ. 264.

Recognised in *Doe v. Staple*, 2 T. R. 695; 2 P. Wms. 624; 2 Br. Ch. C. 544. Nor will it revive by the wife's surviving her husband. Burr. Eccl. Law, 47. Where, however, her will operates as an appointment of uses under a power, executed by her before marriage, it will not be defeated by her after-coverture. 2 T. R. 695. And see *Sheath v. York*, 1 Ves. & B. 390; *Holkway v. Clarke*, 1 Phill. Eccl. R. 339; and *Emerson v. Bovile*, Ib. 342.

she, having lost the freedom of her will, cannot actually and directly make a revocation, as we before have showed. But notwithstanding her will be revoked, yet in case her husband before or after marriage with her were bound or covenanted to perform this woman's will, if he so do not, by payment of the legacies therein bequeathed, his bond or covenant will stand good and be sueable against him: as was adjudged touching the will of Elizabeth Smaleman, married after her will made to one Wood, who first was bound to perform it. Yet another case there is of alteration in the state of the testator's person which makes no revocation of his will; as if he being of sound mind and ability make a will, and after becometh frantic. In this case this is no revocation; so as his will stands till his death irrevocable, if he recover not. Now of a will revoked there may be a revivor by a new publication; and thereof now.

Cro. El. 27.
Cro. Car. 619.
376. 597. tho'
it is no will nor
ought to be
proved, but an
appointment
which he is
bound to per-
form.

It is however said, that the presumption of revocation by marriage and birth of children, may be rebutted by evidence of strong intention, but the Court must be unequivocally satisfied. 2 Add. 455.—(E.)

Of new publications.

HAVING showed how a will may be revoked, and so lose its force ; let us now see how, without making a new will, that so revoked may be revived and set on foot again. And that is divers ways. As, first, by a codicil annexed after thereunto ; as was resolved between Beckford and Parnecot(a), in the King's Bench (b). Secondly,

(a) Cro. El. 493.

(b) *Codicillus*, a codicil, is a diminutive of *Codex*, a book, and is most properly defined after this manner: *Codicillus est voluntatis nostræ juxta sententia de eo quod quis post mortem suam fieri vellet absque executoris constitutione*. A codicil is a just sentence of our will, concerning that which any one would have to be performed after his death, without the appointing of an executor. By force of which words, *absque executoris constitutione*, a codicil is made to differ from a testament: for as a testament cannot consist or be without an executor, so a codicil cannot admit of an executor, being an unsolemn last will. And codicils, when first invented, were only used when the testator had not opportunity to make a testament, by reason of the manifold solemnities thereof; or else as additions to the testament made, when any thing was omitted therein; or something in such testament which the testator, upon better advice and consideration, would alter or retract. And a codicil may be made either in writing, or without; and by him which dieth intestate, or by him which dieth with a testament. And if it be made by a person which dieth intestate, the legacies therein given must be paid by him that shall have the administration of the goods of the deceased. And if the codicil be made by him which hath a testament, then, whether the same be made before or after the testament, it is reputed parcel thereof, and is to be performed as well as

by adding any thing to the will, or making a new

the testament: unless, being made before the testament, it appear to be revoked in the testament, or to be contrary thereunto. And codicils and testaments do both agree in the efficient cause; because every person which can make a testament may also make a codicil, and *à contra*, but they have divers contrary effects. For first, whereas no man can die with two testaments, because the latter doth revoke the former; yet a man may die with divers codicils, and the latter doth not hinder or revoke the former. And secondly, if two testaments be found, and it does not appear which was the former or latter, both testaments are void; but if two codicils be found, and it cannot be known which was first or last, and one and the same thing is given to one person in one codicil, and to another person in another codicil, the codicils are not void, but the persons therein named ought to divide that thing betwixt them (1).—(C.)

(1) A codicil reciting the previous devise of all his lands to trustees, revoking the same so far as related to certain of those trustees, and devising all the said lands to others to the same trusts, declaring such codicil to be part of his will, was held a republication, but not to convey after-purchased lands. *Lady Strathmore v. Bowes*, 7 Term R. 482. So a codicil signed and duly attested, "to be taken as part of his will," operates to confirm a will of lands contracted for but conveyed after the making such will, but before the codicil. *Goodtitle v. Meredith*, 2 M. & S. 5; and *Hulme v. Heygate*, 1 Mer. R. 285.

And a codicil devising after-purchased copyholds to his son in fee, where the will had devised his other property to the same, charged with payment of his debts, was held to republish the will, so as to make the copyholds chargeable. *Rouley v. Eyton*, 1 Mer. R. 128.

To alter a previous will of lands, the same statute requires such codicil to be in writing, and signed by the deviser, or some other in his presence by his express directions,

executor. Thirdly, by express speech or word that it should stand, or be his will^(a); as I conceive

(a) A codicil may be added by parol to a will in writing,

directions, and be attested in his presence by three or four credible witnesses. 1 P. Wms. 344, and n. 1; Dougl. 244, n. 2; 1 Ves. jun. 11. But a codicil making some revocations and further alterations, which was afterwards cancelled and the will interlined, was held not to revoke, upon the evidence of apparent intention. *Utterson v. Utterson*, 3 Ves. & B. 122. Where a man has only disposed of part of his personal estate by will, he may also bequeath the residue by a nuncupative codicil. Raym. 334, and Com. Dig. Devise (C.) But he may not repeal a will of personal estate by parol or nuncupative will, unless the same be reduced to writing, and attested by three witnesses at least to have been read to and allowed by the testator in his lifetime. 29 Car. 2, c. 3, s. 6.

Indeed, after a series of conflicting authorities, it seems now decided, that a codicil duly executed, though it only refer without being annexed to the will, and whether it relate to real or personal estate, operates as an implied republication of the will. 1 Ves. 437, 485; Ambl. 487; Cowp. 150; and 1 Ves. jun. 486; and see all the cases cited and discussed in 1 Saund. 277, n. d.

The former distinction, whether annexation alone might demonstrate the testator's intention to set up the will, seems therefore now to have been abandoned and merged in the above rule.

But it seems that a codicil, though effectually executed to pass lands, cannot by merely reciting the will (by which they are devised) give it operation under the statute, where it has not itself been duly executed. Prec. Ch. 270.

And codicils, however numerous, are effectual where not inconsistent with one another. 1 Show. 549; 1 Ves. 187—(E.)

to have been the better opinion in the said case of Montague and Jefferies, wherein yet was much difference of opinion, both touching revocation and new publication (a). If a man having made a former will, do make a later, which is more than a bare revocation; yet if afterwards, 44 Ass. p. 36. lying upon his death-bed and speechless, both

and this parol codicil shall be put in writing, and affixed to the will as a codicil; and this may as well be done, as a will in writing may be revoked by parol, concerning goods, in the life of the testator. Hil. 22 Car. 1, and Pasch. 23 Car. 1, in B. R.; vide stat. 29 Car. 2, c. 3, by which no will in writing of any personal estate shall be repealed by words only, except the same be, in the life of the testator, committed to writing, and read to him, and allowed by him, and that proved by three witnesses; s. 22.

And the usual form of a codicil is as followeth: viz.

Be it known unto all men by these presents, That whereas I, A. B. of C. &c. have made and declared my last will and testament in writing, bearing date, &c.: I the said A. B. by this present codicil do confirm and ratify my said last will and testament, and do give and bequeath unto D. E. of F. my, &c. And my will and meaning is, that this codicil or schedule be, and be adjudged to be part and parcel of my last will and testament; and that all things herein contained and mentioned be faithfully and truly performed, and as fully and amply in every respect, as if the same were so declared and set down in my last will and testament. In witness whereof, I the said A. B. have hereunto set my hand and seal this day of

A. D. 17—. —(C.)

(a) In the case of Beckford and Parnecot, according to Cro. El. 493, and vid. 2 Atk. 599, it was adjudged a new publication on words spoken by the testator, and not by annexing the codicil; for whether that would have been so, three Judges doubted against one.—(C.)

these wills be delivered into his hand; and he required to deliver to one of his friends about him that will which he would have to stand, and to keep in his hand the other, and he thereupon delivereth to the minister, or other his neighbours, the first made will, retaining in his hand the later, as was done in the time of Edward the Third; here the former will, though made void many years before by the later, is revived, and shall stand as the party's will. But now put the case that a bequest at the first is void; yet by publication after it may be good; as if one give to Sarah his wife a piece of plate, or other thing, and hath no such wife at the time, but after marryeth one of that name, and then publisheth his will again: now this shall be a good bequest. So if one devise lands or goods which one hath not; if he after do purchase the same, and then say, that his will before made shall stand, or be his will, it shall be a good will and bequest; for this in effect is a new making (a) And though

Co. Litt. 111.
Co. Ent. 124.
327. 585.
Plow. 343.
Salk 237, 238.
11 Mod. 123.
Holt's Rep.
240. 244. 747.
Fitgib. 240.
Swinb. 88.
Gilb. Law of
Devises, 11. 124.
146.
2 Bac. Abr. 49.
Eq. Abr. 172.
Vin. Abr. 54.
pl. 5.
3 & 4 P. &
M. Dy. 48.

(a) Error upon a judgment in ejectment, where upon special verdict the case was, Robert Berager had issue his first son William, who had issue the wife of the lessor, and a second son Robert, who had also a son Robert, grandson to the first Robert. Robert the grandfather devised the lands in question in these words: "I give my land in Tilling to my son Robert and his heirs; and I give to my grandson Robert 50*l*. Also I give to my great grand-daughter J. S. 100*l*." Robert the second son dieth in the life of his father, after which Robert the devisor made a codicil, by which he deviseth part of the lands which he had devised to Robert his son to Judith his daughter, and after that he republished

most of the precedent cases be of revocation of particular parts of the will, and not of the total;

his will by word without writing; and said, that Robert my grandson shall have or take by my last will as Robert my son should have done, and afterwards died. And the question was, if Robert the grandson, being the defendant in the ejectment, and also here, should have the land by virtue of this will and republication, or the wife of the lessor, daughter and heir of William the first son. And it was adjudged in the Common Pleas, by the opinions of North, chief justice, Atkins and Windham, against the opinion of Scroggs, that Robert the grandson should have it. And now it was argued that this judgment was erroneous, because that, 1. Grandson and son are different names of appellation, and denote different persons. 2. Lands may not pass by will, unless it be in writing. 3. The deviser himself took notice in his will of the difference between son, grandson, and great-grandson, and made devises to several persons by these several names. 4. The republication by word would not supply the defect of this will, which being of lands ought to be in writing. 5. The republication itself took notice of the diversity of the appellations, *scil.* "My grandson Robert shall have, &c., as my son Robert should have had." It was agreed, that the republication would aid a will, if words are in it capable to be aided. As the Lord Cheney's case, a devise to William, and he had two Williams, it might be averred which William was intended, because the word William was in the will: and 3 Cro. 493, Beckford and Parnecote, a devise of all his lands in Aldworth, and after the will he purchased others, and then republished the will; all pass, because words sufficient in the will. But here he hath the word grandson in the will in writing, and this case is all one with *Bret and Rigden's Case*, Plowd. Com., and *Hartrop's Case*, 3 Cro. 243; and the opinion of Popham and Farmer, in *Fuller and Fuller's Case*, 3 Cro. 422, 423, is denied by the other two Judges there, *scil.* Gaudy and

Cro. El. 493,
Beckford v.
Parnecote.

Bret and Rigden, Trin. 10 El.
Plow. Com. 345.
Hartrop's case,
in Curia War-

yet first, be it considered, that that part so revoked was in effect the substance of the will; next, it is easily discerned, that if one part be revocable, so is another also. And thus revocation may spread itself over the whole: nay, doubtless the whole *uno flatu* may be revoked, as well as by parts. And as the *velleities*, or disposing parts of the will, are revocable and revivable by new publication, as aforesaid; so is also the constitution of executors. As if one of the

dor' was not resolved, Cr. El. 243. but a *Melius Inquirendum* awarded, because office was not fully found. Trin. 33 El.

Fuller v. Fuller, Cro. El. 422. Mich. 37 & 38 El.

See 1 Vent. 341.
1 Mod. 267.
2 Mod. 313.

Clench, and the case there adjudged in another point. But for the defendant in the error it was said, here is a good foundation in the words of the will, and the intention of them may be supplied by matter *dehors*. *Grand* is no other than an addition to *son*, for to distinguish between son and grandson, both being in life at the time of making the will; but when the son was dead, as he was at the time of the republication, the grandson might well be understood by the name of son. And if a man hath no son, but a grandson named Robert, and deviseth lands to his son Robert, the grandson shall take them, according to the opinion of Walmsley; Owen, 88. And here, although that at the making of the will he had a son Robert, and a grandson Robert, yet at the republication, which is a new making of the will, he had only a grandson Robert; he taketh it by the name of son, so long as the name of baptism is rightly expressed, and there is no other to take it. Scroggs, then chief Justice in B. R., held to his former opinion which he held in C. B., and said, that he was not at any time satisfied with the judgment there, and that the judgment ought to be reversed. Dolben, Justice, *semble contre: cæteri nil dixerunt, et adjornatur*. But after, as Levinz heard by others, the judgment was reversed. 2 Lev. 243, *Strode v. Beverager*.—(C.)

executors names be stricken out, and afterwards a *stet* be written over his head by the testator or by his appointment, now is he a revived executor.

Executors revived by a *stet*.

So if the testator express by word, in the presence of witnesses, that the party put out shall yet be executor. But now I mean where the executor's

By words.

name is not so blotted out but that it may be read and discerned, for else the *stet* is upon nothing; and if the verbal re-affirmance should renew his executorship, then must the will be partly in writing and partly nuncupative, his name not being to be found in the written will.

His name must be discernable in the will.

But great alterations being made in these cases by stat. 29 Car. 2, c. 3, the directions of that statute must be observed.

CHAP. II.

OF THE STATE OF THINGS INSTANTLY UPON THE
TESTATOR'S DEATH, BEFORE ANY WILL BE
PROVED.

Here we will consider these several things :

1. *What is wrought by a gift of a thing certain and known; as the white horse, the red cow, &c.* 2. *What by a bequest to an executor.* 3. *What is wrought by a release in the will to a debtor.* 4. *What by making a debtor or creditor an executor.*

Co. Litt. 111.
Keil. Rep. 128.
Dyer, 254.
Swinb. 24.
11 H. 4, 84.
All. 39.
Stil. 54, 73.
Br. devise.
11.
March, 137.
39 El. B. R.
P. 11, J. 13.
March, 96.

AS touching the first, viz. the bequest of a chattel, real or personal, which the testator had in possession: notwithstanding that if the said testator had by his deed or writing, or but by word on his death-bed, or before, given these his goods, and died before they had been taken, he to whom they so were given might have taken them (a); yet in this case of gift by will, neither

(a) That a legatory may not of his own authority take the legacy and serve himself, but must receive the same at the hands of the executor; except in some cases, as where the legatory is possessed of his legacy at the time of the testator's death; for in such case he may retain and keep it, if there be sufficient assets besides in the executor's hand to pay the testator's debts; or if the testator give licence to the legatory to enter to his legacy, then he may do it without the executor's consent; and if he be both legatory and executor, then he may serve himself. Swinb. p. 4, s. 4, n. 23

the legatee, viz. he to whom they are be-
 athed, either take them or recover them from
 executor, or a stranger take them by any suit
 law, for that he hath no property in them ;
 , if the bequest be to himself who is made
 tutor, be it of a lease, plate, chattel, &c.,
 shall not vest nor settle in him as legatee,
 as executor (1), until express or implied elec-
 ; but he is to have and take the same by way

1 & 2 P. and
 M. D. 110. a.
 and 139. b.
 Vide Co. 8 f.
 95 & 96.
 On the second,
 see Co. 10 f.
 47.

So resolved
 Pasc. Tr. 37.
 El. in B.R. only
 Gow. contra,
 Portman El. &
 Sim. Def.
 See more of this
 tit. Legacy ;
 and of the as-
 sent of one exe-
 cutor only; and
 vid. 10 Co. 47
 b. 13 Co. 47.
 Plowd. 520.
 543. Dyer 277,
 b. Str. 70.

he took a good difference in *Necton v. Sharp*, Cr. El.
 when a bond is for the payment of a lesser sum at a
 o come, it shall be a good plea against the legatee
 e the day (if he sues for a legacy), for it is a duty pre-
 by the condition ; otherwise, where a statute or obli-
 is for the performance of covenants, or to do a col-
 l thing ; there, until it be forfeited, it is not any plea
 t a legatee, for peradventure it shall never be forfeited,
 ay lie in *perpetuum*, and by such means no will should
 rformed ; but in such case, the executor shall make a
 tional delivery of the legacy, (*scil.*) if the obligation be
 red, then the legatee to re-deliver the legacy. Rolls
 28.

man devised goods to *A.* and *B.*, the executor assented
 legacy, and then *A.* died ; the executor of *A.* sued
 ecclesiastical court for the part of *A.*, for by the ec-
 tical law there is no survivor in such case. *B.* sued
 prohibition and declared, and upon demurrer and ar-
 it adjudged, that the prohibition should stand ; for by
 sent of the executor the interest is vested and become
 tel, and governable by the common law. 3 Lev. 209,
 d v. *Stukely*.—(C.)

For that is his first and general authority. 3 Bac.
 14.—(E.)

of legacy (1). And the reason in both cases is this, viz. that the law prefers debts and the satisfaction of them before legacies, and ties executors also to that rule; and therefore will transfer nothing from or out of the executor, till he having considered of the state of the debts to be paid, and goods out of which the same are to be paid, shall find that safely this or that legacy may take effect without making any defect in payment of debts, or drawing upon him and his own goods any damage or loss, as a waster, and thereupon shall assent to such legacy (2). Thus

(1) *Quære*, if this should not be *assets*, otherwise it seems insensible. He is indeed incompetent either to assent or elect until such consideration passed, except at the risk of his personal liability; for on failure of assets to satisfy debts, such an assent would be an admission of assets to charge him. Even after payment of debts, he still holds the residue in his character of executor, until he hath made his assent or election by some express act, or from which it may be implied. Com. Dig. Adm. c. 5. What acts amount to such an assent or election will be seen hereafter.

Nor can he give himself preference in respect of a legacy as he may in case of debts. He is equally obliged to refund and even where the legacy is specified to be a remuneration for executing a trust. 4 Bac. Abr. 417; 2 Vern. 434 2 P. Wms. 25. If the legacy be left to him as executor he must declare his election to act, for that is the very foundation of his title. 3 Br. Ch. R. 95.; 3 Ves. jun. 141 4 Id. 212; 13 Id. 417. But where given to him as trustee and as a recompense for trouble, payable within a certain period, and he die before payment, yet is his representative entitled to it, if it appear that he did not neglect or refuse to act. 1 Ves. & B. 134.—(E.)

(2) For in case of failure of assets, as the legatees may
abat

is the law taken; but heretofore some opinions hath run otherwise, viz. that he to whom bequest was made of a thing known and in, might take it without any assent of the executor; and that when to the executor himself goods or chattels, movable or immovable, bequeathed, in case there were otherwise sufficient goods for satisfaction of debts, the same should instantly upon the testator's death, without act or election by the executor, be transferred into and under him in his own right, as a trustee, and not remain in him as executor. As sums of money bequeathed, or so much in money or rings, it is evident that they must be had by the delivery of the executor: yet hath the executor such an interest before delivery, as that, before payment, it will go to his executors. As I take it, no such person, to whom any thing certain is given by will, can make any gift of it before the executor have assented to having thereof: nor, perhaps, will the executor's assent after the grant have such relation to make good the grant precedent (a); why

27 H 6, 8.
Of late, perhaps some single or sudden opinions may also have run that way: but in Portman's case the point was divers times argued, and then adjudged as before. To be bought.

Assent of an infant executor to a legacy not good, if he be not other assets for debts. Cas. in Chan. 257; *Chamberlain v. Chamberlain* (1).—(C.)

so if the executor should pay legacies he would be fully responsible for the debts to the amount of such legacies; he might therefore maintain trespass against a person taking the testator's goods without his assent. 3 Bac. 444; 4 Ib. 444; Dy. 254; Keil. 128; 3 Atk. 240.—(E.) And for this purpose very slight evidence of assent is

so, yet more than an attornment of a lessee which is a like assent to the grant of another; and *quare*, if by the outlawry of the legatee before the executor's assent, this thing bequeathed be forfeited.

If without just cause an executor will refuse to assent, he is compellable by law spiritual, or court of conscience; yet if the spiritual court press to do, where is just cause to stay, a *prohibitio*, *ut credo*; for since executors stand liable to recovery of debts against them by common law, it is reason that law enable them to keep wherewith to pay (a). And here yet note some seem-

(a) Legacies may be recovered in the spiritual court against an administrator, with the will annexed, or against an executor of his own wrong, as well as against an executor by right. Rolls, 919.

An executor is a trustee for a legatee with respect to the legacy; and this is the only reason why the legatee may bring his bill in equity against the executor for a legacy supposing it to be a trust (1).

sufficient; 4 Bac. Abr. 445; 1 Vern. 94; 2 Ventr. 358; and not only in express terms, but from indirect expressions of particular acts. See Com. Dig. Admon. c. 6; Shep. Touch. 456; 4 Bac. Abr. 445; 10 Co. 47, b.; 1 Roll. Abr. 68; 3 P. Wms. 12.

And after it has been once given it cannot be retracted but the legatee may justify taking it, and it seems he will have a lien on the assets. 4 Bac. Abr. 445, and 3 At 238.—(E.)

(1) And after assent to a specific chattel bequeathed, an action at law may be sustained against the executor. 3 East Rep. 120.—(E.)

ing opposition of the law : for where before great difference was showed between a devise or bequest, and a gift or alienation executed in one's life-time ; yet the Lord Dyer reports it to be resolved, that where a lease for years was made upon condition that the lessee should not alien in his life-time, yet a bequest of this lease by his will was a breach of the condition, as being an alienation in his life-time.

2. Of discharge by will to a debtor, some question may be, whether to perfect and make good this, so as the debtor may plead it in bar, there be not requisite, as in the former, an assent of the executor ? On the one side, since this giving is a forgiving, for he to whom it's bequeathed cannot otherwise have it than by way of retainer ; it may probably be said, that here needs no such assent of the executor's, as in the case where any thing is to be transferred ; for

A man made two executors, of whom one made his executor and died, and afterwards the surviving executor died intestate : a legatee sued the executor of the executor who first died, in the ecclesiastical court, for his legacy, who pleaded this matter ; which plea they refused, upon which he prayed a prohibition, and it was denied ; for the matter is testamentary, and perhaps the executor of the executor hath all the goods in his hands, and is executor of his own wrong. And no other in the case to be sued for recovery of the legacy ; and although that the survivor shall have all by our law, it is not so perhaps in theirs ; and the matter belonged to their law, and if they proceed ill he ought to appeal, but they shall not be prohibited by this Court ; and the prohibition was denied. 1 Lev. 164, *Guillan v. Gill*.—(C.)

here is rather an extinguishment and an exoneration, than a passage of a chattel by way of donation. On the other side, it is probable that it being but a bequest, and so a legacy, since debts are in law and conscience to be satisfied before any legacies; therefore the executor, having no sufficient otherwise to satisfy his testator's debt may sue for this debt, and refuse to suffer it to pass away as a legacy (1). And to this opinion do I incline, as best for creditors; and satisfaction of debts is by law respected as an act greatly concerning the testator's soul. But some will perhaps, make a contrary doubt, that although there be an assent of the executor's to this discharge, yet it will not amount to a legal release; for that a debt, at least if it be by specialty, cannot be released but by deed, and a will is no deed; for a seal is not necessary thereunto, though it be fit and convenient. Whereto I gave this answer, that a will, though it be not properly and legally a deed, for it may be good enough without seal, which is an essential part of a deed, yet hath it the force and effect of a deed; for as a release cannot be made but by deed, so neither can an estate or interest, though but for years, in tythes, advowsons, commons, fairs, and like things, be granted or assigned otherwise than by deed; yet it is clear that such an estate for years in any of

Unumquodque
dissolvitur eo
modo quo li-
gatur.

Being things
that lie in grant.

(1) But by such assent, it becomes effectually discharged.
1 P. Wms. 83; 2 Id. 332; 3 Atk. 580.—(E.)

these may be given by will, as well as a lease of land; which proves a will to have the force and effect of a deed.

Of making a Debtor or Creditor Executor: and first of the Debtor made Executor.

SUPPOSE we then that *A.* and *B.* being made executors, the testator was indebted to *A.* twenty pounds, and *B.* was indebted to the testator twenty pounds, how do things stand presently upon death? First, it is clear that the debt of *B.* to the testator stands in law extinct; this making of him executor being a release in law(1).
21 H. 7, 31.
Plow. Com.
185. contr.
Danby & Choke.
8 E. 4, 3.
And may be
granted, that he
should account
before the ordi-
nary for it.

Therefore let creditors take heed of making their debtors executors. And yet doubtless (methinks) such a debtor made executor should hold himself restrained in conscience from taking benefit thereof, if (the debt remitted) there shall want to satisfy either debt or legacy of the testator(2). And I doubt whether a court of con-
Yet it seems
Plowd. 186, a.
the law was
taken to be at
supra. 8 E. 4.

(1) That is, it takes away the legal remedy, since no man can maintain an action against himself, and the right of action by the appointment is become vested in the creditor; 3 Bac. Abr. 11; Salk. 299. 302; Roll. Abr. 920; 5 Co. 30; Co. Litt. 264, b; Harg. n. 1; Cro. Car. 373; 1 Ventr. 303; and that whether the debt be on specialty or simple contract. 8 Co. 136. And if there be several obligors, and one be made executor of the obligee, the whole debt is extinguished. 11 Vin. Abr. 398.—(E.)

(2) The distinction prevails in equity between such an appointment being allowed to defeat the claims of creditors

science may not justly so order, the testator being perhaps ignorant of this point in law, that this debt should be released by making the debtor executor (a).

Though he never administer.
21 E. 4, 3. 81.
11 H. 6, 38.

And what is spoken of making the debtor executor, generally the same is to be understood of making any one of the debtors executors, where there be many joint debtors: and so where many executors be made, and but one of them is debtor

(a) Debtor executor to the testator decreed to pay to the devisee of the residue of the estate, though it was objected, that the case was different from former precedents. Ca. in Ch., *Phillips v. Phillips*.

So where an infant at seventeen makes the debtor his executor, the debt is extinct. Ib. 264.

For as the law gives the infant power to make an executor it gives his executor the same advantages with others. Hawk. 351.—(C.)

and other legatees. On a failure of assets to satisfy the former, the executor, being debtor to the estate, is compellable to bring such debt into account, either in the spiritual court or in equity. Salk. 302. 306; Shep. Touch 497; 13 Ves. 264. But with reference to other legatees, a such a virtual release is to be considered as a bequest, he has, *prima facie*, an exclusive right thereto. Co. Litt. 264, b. Harg. n. 1. The presumption, however, may be repelled by express terms, or implication from the contents of the will, as by a specific legacy to the executor, or of part of the debt to another, or of the residue amongst several executors, it shall be brought into the account; or if he be mere trustee of the whole estate, or where the debt arises in respect of the real estate, in favour of the heir. 3 Bac. Abr. 11, 12; Yelv. 160; 3 Br. Ch. c. 110; Ca. T. Talb. 240; 4 Bro P. Ch. 180; 11 Ves. jan. 87; 1 Atk. 468.—(E.)

to the testator; for they cannot sue without making him who is the debtor also a plaintiff, which he cannot be against himself. The like law touching action of trespass or account. Yet of old, where one made his bailiff one of his executors together with *A.* and *B.*, who brought an action of account against the bailiff in their two names only, Justice Herle held the action well brought. This was in the beginning of King Edward the third his time; but the contrary hath been since resolved. Some also have held, that though in the life of this executor who was a debtor he could not be sued; yet after his death, the surviving executors might sue his executor. But that cannot be, as I take it, for that debt was utterly extinct by the making of him executor, as if the testator had released it to him; yea, though his executor died before he did ever administer or prove the will⁽¹⁾. And like extinguishment of the debt, if the creditor marry with one of the executors of the debtor^(a): yet was there an

2 R. 3, 20.
per Starkey, &
22, per Vavasor
9 H. 5, 13.
left a demurrer
in trespass by
all, against the
executor, who
was trespasser.

3 Ed. 3, 23.

6 H. 4, 3.
3 Ed. 4, 5.
Cook.

21 H. 7, 31.
20 E. 4, 17.

21 E. 4, 3, 61.
Plowd. Com. 36.
Plowd. Com.
183. Salk. 300.

11 H. 4, fol. 83,
84.

(a) Where a feme executrix take the debtor to husband, notwithstanding the debt remains; if feme obligee take the debtor to husband, this is a release in law. The like if two femes obligees, and one take the obligor to husband. Coke's 1 Inst. 264, b. If the marriage of the feme executrix should be a release, it would be a devastavit, which an act in law never works.—(C.)

(1) Or if he hath refused to act with his co-executors. Salk. 308. But if he formally renounce before the ordinary, it seems he is not released; for a man cannot be compelled to accept a release any more than a grant. *Ib.* 307.—(E.)

31 E. 3. Fitz.
Ex. 72.

action of debt maintained temp. Ed. 3. by the husband and wife against the husband and other executors, upon an obligation by the testator to the wife before her marriage. But if a debtor take administration of the goods of his creditor this, methinks, should not discharge him, but this his debt should stand as assets in his hand because the intestate did not act to free him from the debt (1).

The Debtee, or Creditor, made Executor.

Plowd. Com.
158. By all
the judges but
Brook, chief
justice, Plow.
186, b, where
the goods be of
more value of
which shall be
so altered.

THIS making of the debtee executor, and so the party who both should pay and be paid the debt, giveth him clearly power to pay himself before any other, if his debt be by specialty or upon record (a). Nay, some have held, that so

(a) Where the obligor makes the obligee his executor though the action be gone, the executor may retain (2). 3 Co. 1 Inst. En. 1e Table. Coke's 1 Inst. 264, b. If he accept the executorship. Hawk. Abr. 352.—(C.)

(1) Each of these cases are now considered only as temporary suspension of the remedy, by operation of law. Co. 136; Sid. 79; Leon. 320; Moore, 236; Salk. 306. So the appointment of an executor or administrator, *duraminiore ætate*. 11 Vin. Abr. 400; Ld. Raym. 605.—(E.)

(2) That is, in preference to any other creditor standing in an equal degree, but not otherwise. 3 Bac. Abr. 10. 83 Roll. Abr. 922; 11 Vin. Abr. 72. 261. 265; Com. Dig. Adm. c. 2; Winch. 19; Co. Litt. 264, n. 1; 3 Burr. 1380, *infra*. And the same rule holds in equity. 1. P. Wms. 296; and Ves. & B. 194; and he may plead such retainer either

much of the goods of the testator shall be altered in property out of the executor as executor, into him as creditor; but how that can be I cannot see: for whether it shall be satisfied out of the leases and chattels, real or personal, whether out of the corn in the barns, cattle in the fields, plate, or household-stuff, this, till some election made by this debtee executor, cannot be known, nor shall be effected by any operation of law preventing the executor's election in taking his satisfaction where and how he will. For certainly, as an executor hath election to pay which creditor he will first, so hath he election to pay and satisfy himself by what part of the testator's goods he will⁽¹⁾; yet, perhaps, if there be ready money in the executor's hands, there shall be an alteration of the property of so much thereof as was owing by the testator come not to the executor. And if there come not to the hands

See Plow. Com. 544, the like of a legacy of 20*l.* given to the executor.

Or if the goods amount in all to no more than this debt.

See Plow. Com. 158.
13 H. 8, 15.
11 H. 4, 83.
12 H. 4, 21.
20 E. 4, 17.
21 Ed. 4, 3.

specially, or give it in evidence on the plea, *plene admin.* 11 Vin. Abr. 266; 1 Brownl. 75; 2 Bl. R. 965. But equity will interpose to restrain him from availing himself of this right in fraud of others. 3 Bac. Abr. 83, n.; 10 Mod. 496. So, if the debt sought to be retained were, in fact, become his own debt, by the death of the principal. Godb. 149.—(E.)

(1) The right to retain is indeed co-extensive with his obligation to pay, or liability to be sued (Com. Dig. Adm. c. 2; 3 Burr. 1384); and that he may either retain or resort to his legal remedy by action, see 3 Bac. Abr. 10, n.; Com. Dig. Adm. c. 1; 3 Keb. 166; Hob. 10; 2 Lev. 73; and in case he die before having made his election, his executor shall have the same power of retaining. 11 Vin. Abr. 261. 263; 3 P. Wms. 183; 2 Brownl. 50.—(E.)

Plow. 184, b.
& 185, b.
He is barred ;
for he cannot
apportion his
debt.

of such executor sufficient to pay himself, he may have an action of debt against the other executors, or the heir, as by some hath been conceived : yet let it be well advised of, whether, if he do administer at all, and especially if he pay himself any part, he have not thereby barred or disabled his suit for the residue. But if he refuse to administer at all, it were very unreasonable that he should not be able to sue the other executors : for so a debtor might by subtilty make his creditor an executor with others, and take a course that his goods should come only into the hands of those others, so as the creditor could not pay himself ; and consequently, if he could not sue the other executors, he should thus be stripped of his debt by a sleight⁽¹⁾. *Quære*, if he may bring the action in the name of the other executors only, the will being proved in his name as well as in the names of the rest ; or whether the action shall not be brought in his name also, and then he be severed at his own prayer ? But against the heir there is none to join with him : and he may sue, if he have not administered as executor ; this admitted, that the bond extend to the heir, which without express words it doth not, though for the executor it be otherwise^(a).

(a) 12 H. 4, 21. He may sue the heir, if the heir be bound, and he hath not sufficient goods as executor. Co. Litt. 264, b. n. ; Salk. 304. He may release before probate. Co.

(1) 3 T. R. 557.—(E.)

Thus having considered of the state of things before and without any will proved, or other act

Co. Litt. 292; 3 Bac. Abr. 52; 1 Vin. Abr. 202; Plowd. 280; 1 T. R. 480.

If the heir is not expressly bound in the bond of his ancestor, he is not bound at all. 2 Saund. 136. But the executor is bound by his testator's covenant, though not named therein. Dyer, 14 & 305.

Debt upon an obligation against baron and feme, as the feme was heir to Bostock. The defendant pleaded in abatement another action depending against the husband, and others, as executors of Bostock. The plaintiff demurred; and it was argued for the defendant, that the plea was good; for admits that the plaintiff might charge the heir or executor at his election, or both severally, and recover part against one, and the residue against the other, yet he may not charge one and the same person as heir, and also as executor at the same time; for by that means he might have two judgments at the same time for the same thing, for which the defendant could not have any remedy by *audita querela*; for he might not allege it for relief in *audita querela*, because he might have pleaded it in abatement. But where an action is against one person as heir, and another action against another person as executor, and he hath two judgments, and after that he hath levied the debt upon one, he endeavoureth to levy it again upon the other; he shall be aided by *audita querela*, because that he could not have pleaded it in abatement; and of such opinion was Pollexfen, chief justice, upon the first argument in that term; but Powell, justice, *contra*. For being one and the same person representing as well the heir as the executor, it is all one as if it was in divers persons. Rookesby then silent; but afterwards, in another term, Pollexfen being dead, judgment was given by Powell and Rookesby, justices, that the defendant *resp. oust.* Lev. 3, p. 303; and *Haight v. Langham*, 2 W. & M. in C. B.

Debt against them as executors of Bostock upon the obligation *supra*, Langham pleaded in abatement another

done by executors, we should now come to the point of the proof: but two things pertinent to it are in order precedent.

action depending against him, and his wife, as she was heir the plaintiff demurred, and the judges differed in opinion, *supra*. *Adj. ult. arg.* *Vide* 36 E. 3. 36, 38. Two writs brought for the same thing, each pleaded in abatement to the other, and both abated. The like opinion, 9 H. 6, 51; and 39 H. 6, 38; and Co. 5, *Sperry's Case*. The reason of the abatement of the writs was not only because he shall not be twice charged, but that he shall not be twice vexed for the same debt. And that the obligee might charge the heir or executor at his election, or both, if the one hath not sufficient 1 And. pl. 13. The heir charged, although the executor had assets. *Fitz. Execution*, 163; *Dyer*, 204. In debt against the heir, it is no plea that the executor hath assets. 7 H. 4, 2. Debt lieth not against the heir, until the sheriff returned that the executor hath no assets; and Co. 2 Inst. 233; and 7 E. 4, 13, a. Opinion, that debt lieth not against the heir, if the executor hath assets. And afterwards judgment was given as in the case above, *de resp. oust.* Lev. 3, p. 304. *Haight v. Langham, Hall, &c. Executors de Bostock*, 3 W. & M. in C. B.—(C.)

CHAP. III.

1. *What may be done by or to an executor before proving of the will.* 2. *Of refusal, and of the things incident thereunto.*

BEFORE PROBATE WHAT MAY BE DONE BY
OR TO EXECUTORS.

AS to this, it is clear, that before proving of a will by the executor he may seize and take into his hands any of the goods of the testator; yea, enter into the house of the heir, if not locked, so to do, and to take the specialties of debts; and generally he may do all things which to the office of an executor pertain (except only bringing of actions and prosecution of suits). He may pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases or acquittances of debts owing by the testator (a): yea, if before such proving the day occur for payment upon bond made by or to the testator, payment must be made to or by this executor, though no will be proved, upon like

9 E. 4, f. 33, 47.
7 H. 4, 18.
They cannot
sue till they
have the will,
under the seal
of the ordinary.

(a) An executor before probate may release an action (yet he can have no action), because the right of action is not in him. Coke's 1 Inst. 292, b.; Co. Litt. 264, b. n.; Salk. 304; 3 Bac. Abr. 52; 1 Vin. Abr. 202; Plowd. 280; 1 T. R. 480.

Wray 23 El.

Keil. Rep. 128.
Dyer, 254.

pain of forfeiture as if the will were proved (a). Also an executor may before probate sell or give away any of the goods or chattels of the testator. And whereas the assent of an executor is necessary to the settling an execution of a legacy, as before had been showed; so as if one give me his white horse, or black cow by will, or any other well known thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespass at the executor's suit, if he do not assent; yet an executor before the will proved may give his assent, and it will stand good. Yea, although he die after any of these acts done, the will being never proved by him; yet do these acts so done stand firm and good as I take it. Yet (as I find) an executor making his will, and dying before he hath proved the will of his testator, his executor may not prove both the wills, and so become executor to both the testators (b). But in case the goods

His assent to a legacy good, if sufficient assets; secus not.

(a) Resolved, that before the probate, Crew, executor of Clark, a creditor of Staley, goldsmith, might arrest Staley for a debt due to Clark; and also, before probate, Crew might have released Staley of such debt due to Clark, but Crew could not declare against Staley for such debt, until he had proved Clark's will. Raym. 479, 481, and *infra* 84; *Lady Chester's Case*, per Hale, C. J. But if a feme-covert be executrix, she cannot release; for she may do nothing to the prejudice of her husband; but the release of the husband is good. 5 Rep. 27; *Russel's Case*; Co. Lit. 172.—(C.)

(b) If the executor die before probate, it is in law a dying intestate. Hetley, 115.—(C.)

were, after debts paid, bequeathed to the executor, his executor may take administration of the first testator's goods with the will annexed; as by Dr. Drury was in the late queen's time declared to be the law and course of the court spiritual; to which credit was given by the judges of our law and the court of Star-chamber: or though the book doth not mention it to have been in the Star-chamber, it is elsewhere so reported. Yea, an executor for goods of the testator taken from him, or a trespass done upon the lease-land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of trespass or replevin, or detinue; for these actions arise upon the executor's own possession.

22 & 23 El.
Dy. 372.

For here he
need not name
himself execu-
tor.
Dy. in Plow.
Com. 281.
Case of Greys-
brook and Fox.

But before the proving of a will, an executor cannot maintain a suit or action of debt, or the like (1). And the reason is, for that therein he must show forth the will, proved under the seal of the ordinary. And so as I take it, must it be, if he bring any action for trespass done or

He must show
the probate
upon declaring.

(1) He may indeed commence such, though he cannot declare before probate, for his title to sue is founded thereon, & he must make *profert* of the letters testamentary, but when produced they shall have relation to the time of suing with the writ. 3 Bac. Abr. 53; 11 Vin. Abr. 202; 9 Co. Litt. 292, b. And he may, therefore, arrest his testator's debtor. So in Equity, a probate subsequently taken out will justify his filing a bill; and it seems to be sufficient if taken out at any time before the hearing. 1 P. Wms. 752; 3 Id. 351.—(E.)

34 P. & M.
Dy. 135, a.
Dy. in Flow.
Com. 281, a.
3 Bac. Abr. 53.
Dy. 135.

Flow. Com.
27, b.

goods taken in the testator's life-time; so as the testator himself was entitled to the action, and it grows not upon the executor's possession. find that an executor granting the next avoidance of a church which to him came from the testator the grantee maintained a *quare impedit*, without showing forth the will: but the executor himself might so have done as of his own possession before the will proved, and so, without showing it under the seal of the spiritual court as well as actions of trespass or replevin, for goods taken after the death of the testator: yet in the principal case of *Greysbrook* and *Far*, which was an action of detinue by the executor for goods taken or detained after the testator's death, the plaintiff did show forth the will proved. But that proved not any necessity thereof; or that, if the will had not been proved, it could be no hurt to show it forth. So upon his own contract for the testator's goods: as if the executor sell cattle or other goods of the testator before the will proved(a), he may for the money payable mai

(a) Assumpsit, as assignee of commissioners of bankrupts. *scil.* Staley, a goldsmith, where upon *non assumpsit* and special verdict, the case was, that Staley being indebted to Walter in 1,000*l.* upon judgment and to divers other persons particularly to one Clark in 1,000*l.*, who died and made of Crew his executor: Crew sued a bill of Middlesex against Staley, Nov. 6, which was before the probate of the will, it being not till the 18th of Nov. Staley was arrested before the probate, *scil.* the 8th of Nov. and put in prison; and the same day that the probate was, *scil.* the 18th of Nov. Stal

in an action for debt before he have proved
 by will: and in this, and the action of trespass,

id the 1,000*l.* to Walter; but if the payment was before
 : probate or after, appeared not, but it was upon the same
 y; and after this, a commission of bankrupt is sued against
 ley, and the commissioners assigned this 1,000*l.* paid to
 lter to the plaintiff, as part of the estate of Staley. And
 this case divers points were, in which the court did not
 mimously agree; but in one they all agreed, *scil.* that the
 est of Staley by the executor, before the probate, was not
 al as to Walter, and then Staley could not become bank-
 t the 8th of Nov. when the arrest was made, as to
 lter; so that the payment to Walter was good. They
 eed, that between the parties, that is, between Crew and
 ley, the bill of Middlesex, and the arrest upon it before the
 bate, were made good by the probate after, according to
 loll. Execut. 917. Executor sued a writ, and arrests a
 n before probate, and afterwards proves the will, all is
 de good between them being parties: but in the case
 e it shall not prejudice a third person Walter, to make
 payment to him ill, which had been good, if it had not
 n for this arrest; which *in rei veritate* cannot be good
 ore probate, although that between the parties it is good
 relation. Note, that the words of the statute are, That a
 1 arrested, and in prison six months, shall be a bankrupt
 n the time of the first arrest; and here Staley was arrested
 8th of Nov. and lay in prison six months. Raymond,
 Error of this judgment, and the judgment affirmed.

entr. 370; Lev. 3, p. 57, *Duncumb v. Walter*.

o, Trover by an administrator, and count that he himself
 possessed of the goods and lost them, and the defendant
 erted them; and upon *non cul.* verdict for the de-
 lant; and the question was, If the plaintiff should pay
 s; for it was objected by Seis, serjeant, that the action
 g of his own possession, he need not have named himself
 inistrator; and he cited *Atky* and *Heard's* case, 1 Cro.
 re, in such a case, the plaintiff paid costs: but on the

1 Roll. Execut.
 917. 3 Bac.
 Abr. 53.

The relation
 shall not preju-
 dice strangers.
 Trin. 34 Car. 2.
 3 Lev. 576. B.
 Pasch. 36 Car. 2.
 1 Vent. 370.
 B. R.
 Skin. 22. 87.
 11 Vin. Abr. 204.
 And see Cooke's
 Bankr. Law,
 943.

4 Mod. 244.
 2 Lev. 165.
 2 Jon. 47.
 1 Vent. 92, 94,
 166.
 Cro. El. 228,
 503.

Cro. Car. 29.
 Hut. 78.

there is no necessity of naming him executor (1). Also, on the other side, an executor may well enough be sued for debts of the testator before the will be proved (a); for he may not by his own act of delaying the probate of the will, keep off suits, except he will refuse in due manner, that so administration being granted, there may be somebody suable by the testator's creditors for

2 Cro. 229, 361.
Yelv. 168.
3 Leon. 152.
6 Mod. 91.
1 Sal. 207.
Vide 4 Jac. c. 3.
In Peacock's
Case the issue
was found for
defendant.
Vide 8 El. c.
Mich. 7 Car.
in Atky v. Herd,
in such a case
plaintiff paid
costs. Cro. Car.
219. Vide 23
H. 8, c. 15.

other side were cited *Peacock's* case; where, in ravishment *de gard* by an executor of a ravishment in his own time, the plaintiff being nonsuit, paid no costs; and *Bull and Palmer's Case*, Pasch. 28 Car. 2, B. R. Assumpsit by an executor upon *insimul computasset* with him for a debt due to the testator, the executor nonsuit paid no cost; and now, *per tout le court*, the plaintiff shall pay no cost; for all is in the right of the intestate, although that the conversion was done in the time of the administrator, and the damages and costs recovered or lost shall be upon the account of the testator. Lev. 3, p. 60; *Mason v. Jackson*, 34 Car. in C. B.—(C.)

(a) So in trover, for goods taken after the testator's death; and the same I suppose in trover for goods taken in testator's lifetime, if the executor has made a demand. Carth. 154; 3 Bac. Abr. 53. And in actions against them, all executors must be named, although the will be not proved (2). 9 Rep. 37. 78; *Hensloe's Case*.—(C.)

(1) Ld. Raym. 436; Ca. Temp. Hardw. 204; 1 Vent. 109; 2 T. R. 477; 4 T. R. 277; 7 T. R. 358. And therefore no profert of the letters testamentary need be made. So, where he avows for rent of a term vested in him as executor, accruing in his own time; but he must show his character for rent accruing in his testator's lifetime. 7 T. R. 358.—(E.)

(2) So, if he hath elected to administer. Plowd. Com. 280, b; 11 Vin. Abr. 205; 2 Vern. 49.—(E.)

debts by him owing. And the usual plea of the defendant, to estrange himself from the testament, is to say, that he neither is executor, nor hath administered as executor, so as if he either be executor *de jure*, or *de facto*, by his own act of administering, it sufficeth.

Of Refusal to prove the Will, and therein of Administration, forecluding Refusal.

Now as touching the other point fit to be thought of before we meddle with the probate, viz. refusal to prove, we will thereabout consider these several parts, viz. First, how and in what manner refusal may or must be. 2. In what cases or in respect of what acts one named executor hath lost or determined his election of refusal or acceptance. 3. Of what effect and operation the refusal is; what difference where all the executors refuse, and where but some or one of them. 4. What relation it hath.

Now touching the first (a): the ordinary before

(a) An executor may refuse the executorship, but he cannot assign it; but his refusal cannot be verbally, but by some act entered in the spiritual court, but there is not any certain form of renunciation; but if the meaning and intention of the renouncer appeareth it is sufficient, without the formal words of renunciation, as *ego dico me nolle esse heredem*; and so it was in *Sir H. Goodier's Case*, 1 Leon. p. 135. Sir Nich. Bacon, lord chancellor, Sir Robert Catlin, lord chief justice, Justice Southcote, and Gerrard, attorney-general, were made executors to Sir R. R.: they sent their

3 H. 7, 14.
 9 Ed. 4, 47.
 3 Hen. 7, 14.
 Plow. Com. 281

9 Ed. 4, 33.
 See Pl. 184, a.

committing administration, where a will is made and executors named, if he know of it, must send out process against the executors to come in and prove it: and if they do not come, they are to be excommunicate; but if they do come, if they, nor any of them, will prove it, by reason of such refusal the ordinary may commit administration; perhaps also they may be appointed executors at a time future, and not presently. Now refusal cannot be verbally or by word, but it must be by some act entered or recorded in the spiritual court, and therefore must be done before some judge spiritual, and not before neighbours in the country; for that is not effectual (a). Yet Sir Ralph Rowlet making the lord keeper Bacon, Catlin, chief justice, and the Master of the Rolls

letter to the chief officer of the Prerogative Court, wherein their business was so great they could not attend the execution of the will, and prayed him to grant letters of administration to H. G., and an entry was made in the court *Executores testamenti prædicti executionem inde super se assumere distulerant*, &c. And it was held that the renunciation was good, and the entry thereof good. Cr. El. 92; S. C. Hil. 30 El.; *Broker v. Charter*.

Note, That the time, wherein he that is named executor in the testament is to deliberate and determine, whether he will accept or refuse the executorship, is left to the discretion of the ordinary, who not only within the year (allowed by the civil law), but within a month or two, may cite him to accept or refuse the office. P. Swinb. p. 6, s. 4.

(a) If debtee made executor sue the ordinary for the debt this amounts to a refusal of the executorship. M. 28 & 29 Eliz. *inter Brooker & Carter*, in Ba. Com.; & 4 Burn Eccl. L. 198; P. Swinb. 6, s. 12.—(C.)

executors; they wrote a letter to the ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every of their refusals to be recorded: and this was held good. So as a lease being by that will bequeathed to Catlin, and he, after this refusal, entering and assigning it to one, and the administrator assigning it to another; it came in question between them whether had best right; and judgment was given for the assignee of the administrator against Catlin's assignee: whereas if the refusal had been void, Catlin had continued executor, and so his title had been better. In case the ordinary himself be made executor, there (saith the book) he may refuse before his commissary: and so was it there pleaded for the Archbishop of Canterbury, who was made executor to Sir Will. Oldhalle (1).

9 Ed. 4. 33.
The book calls
him Cardinal of
Canterbury.

(1) When the refusal is made in person, he takes an oath that he neither has, nor will intermeddle in the effects, to the injury of any creditor. Such refusal is also entire, and cannot be in part only. 11 Vin. Abr. 139; 1 Salk. 297; Brownl. 82.

So, before administration can be granted, with the will annexed, when there are several executors appointed, they must all duly renounce. Roll. Abr. 907.

A mere omission to prove a will, does not extinguish the executor's right to come in after administration has been granted; and he may sue the administrator. 11 Vin. Abr. 941; Leon. 90.

So if the executor named be unknown, administration may be granted until he appear; but he may then claim the probate. 4 Burn Eccl. L. 202.

But

But a refusal to take the oath, or in case of a Quaker to take the affirmation, is a refusal of the office, and may be so recorded. 4 Burn Eccl. L. 213; Ld. Raym. 363. And on the contrary, taking the oaths is an election of the office, and he is compellable to perform it. 11 Vin. Abr. 407; 1 Vent. 335; Swinb. 6, s. 19. So, if he once administer. Salk. 301, 304, 307. And an omission to take out probate within six months after death of the intestate, renders him liable to a penalty of 50*l.* by stat. 37 Geo. 3, c. 90, s. 10.

If an executor accept the office, a *mandamus* will lie to compel the ordinary to grant probate; but as the question of there being a will or not is wholly within the cognizance of the ordinary, when such a question is pending before him, he may return such fact to the writ. 4 Burn Eccl. L. 204, 205. But he cannot impose any terms on the executor not prescribed by the will. Ld. Raym. 361; Stra. 672.—(E.)

What shall be such a Meddling or Administering by an Executor, that he cannot refuse after.

9 Ed. 4, 47.
Selling land as
executor is ad-
ministration.
Dyer in case of
Greysbrook and
Fox. Pl. Com.
280. b. Pas. 7
Eliz. 36 Hen. 6,
f. 7, 8.

As, to the second, where an executor hath administered, he cannot afterwards refuse, because he hath already accepted of the executorship, and so determined his election(1): at least the ordinary ought not to accept of such refusal, but should compel him to take upon him the executorship, as the law was taken both in the

(1) But a term of years of the value of 5*l.* constitutes *bona notabilia* in the diocese in which the land lieth, (3 Bac. Abr. 47; Com. Dig. Adm. B. 4;) and not where the lease is found. So an annuity out of a parsonage. Dyer, 304, n.; 11 Vin. Abr. 80.—(E.)

time of Ed. 4, and Queen Elizabeth. Yet if the ordinary do admit one to refuse, notwithstanding that he hath administered, this standeth good, as it seemeth conceived by the judges in the time of H. 6. For there the executor commanded one to take the goods of the testator out of the hands of J. S., who did accordingly, and afterward the executor refused before the ordinary, and administration was committed to the said J. S., who brought an action of trespass against the party so taking the goods from him; and there the refusal and committing administration were admitted to be good: so perhaps *factum valet quod fieri non debuit*. And it well may be that the ordinary did not know of the executor's such intermeddling at the time when he did admit his refusal. After refusal, and administration committed, the executor cannot go back to prove the will, and assume the executorship⁽¹⁾: but if

(1) But it seems, that after the death of the administrator he may retract. 3 Bac. Abr. 42; P. Swinb. s. 12.

And it seems that every act which would constitute him an executor *de son tort*, is a sufficient intermeddling to determine such election. 3 Bac. Abr. 44; 11 Vin. Abr. 205; Roll. Abr. 917; Swinb. 6. s. 22. Consequently an interference *alio intuitu* than that of administration is no election.

An executor of an executor, intermeddling with the effects of the first testator, cannot afterwards refuse to administer the effects of his own testator, but otherwise he may elect the one and renounce the other, in which case administration *de bonis non* will be granted. Shep. Touchst. 464; Com. Dig. Adm. b. 2. 10; 2 Lev. 182; 1 Show. 411.—(E.)

Com. Dig. Adm.
B. 4.
Mich. 27 & 28
Eliz.

only upon the executor's making default to come in upon process to prove the will, the administration be committed; here the executor may yet at any time after come and prove the will, and so undo the administration; as was in the late queen's time resolved between *Bale* and *Barter*.

Boxell's Case in
Com. Ban.

A. being executor did administer, and yet would not prove the will. B. took administration; and being sued for debt, did plead the matter *supra*, and it was held a good plea; and it was found for him before Justice Doddridge ad Ox. in a stat. 2 Car. Reg.

But what if after refusal it shall appear to the ordinary that the executor hath administered before his refusal, so as had it been then known, the ordinary should not have admitted him to refuse? Whether now may he revoke his administration (for it is revokable), and enforce the executor to proceed to proving of the will? And surely, methinks he may; for that the executor by administering hath determined his election, and accepted the office of executorship: now he cannot both accept and refuse. Besides, we know that creditors may maintain their suits against him having once administered (1); the common plea to free himself, and to show that he is not the party suable for the testator's debt, being that he neither is executor, nor ever did administer as executor; wherefore he having administered, it will be found against him. Now it is not congruous that in the spiritual court

(1) But if there be several executors, and one of them exhibits an inventory, this shall not charge the other in an action brought against them; but the party that sues must prove that such executor hath actually administered, and that goods came to his hands, or else he shall not be chargeable. Lent Ass. Ebor. 8 Car. 1; *Ireland's Case*, Clayton's Rep. p. 106, Pl. 179.—(E.)

there should be no executor, and yet in the courts of Westminster there should be an executor. But since this point of administering is so material to the point of being admitted or not admitted to refuse, we will here consider in this place briefly what shall be said to be an administration by an executor determining his election, and disabling his refusal, and what not. 1. Some will perhaps conceive, that the act of the executor in the fore-mentioned case, where he only commanded J. S. to take goods of the testator's out of a stranger's hands, was no administration; and it is true that in that book it is passed in silence, and not expressly said to be an administration. But the Lord Dyer, in the case of *Greysbrook* and *Fox*, speaking of that case, saith expressly, that the ordinary might there have rejected the executor's refusal; for, saith he, when the executor had once intermeddled, he should not have been suffered to refuse: so as he doth clearly admit that to have been an administration. And elsewhere it is held, that if an executor takes goods of the testator, and converts them to his own use, this is an administration; yea, if he do but take them into his hands, say some, without converting of them(1). If the wife takes more apparel of her own than is necessary, this is an administration as the book admits; but if by the assent or delivery of the executor, it is not.

What shall be said an administration.

32 H. 6. 7.

20 Ed. 4. 17. &
21 E. 4. 5.

21 Ed. 4. 5.
21 H. 6. 9, 20.
33 H. 6. 3, 1, 8.
1 El. Dy. 166.
13 Ed. 3.
Exec. 91. 3.
4 May. Dy. 135.
26 H. 8. 7, 8.
20 H. 7.
Kelw. 63.
21 Ed. 4. 5.
20 H. 7. f. 5. a.

(1) Though it be to take a specific legacy bequeathed to him. Roll. Abr. 917; Vin. Abr. 206.—(E.)

More clearly, if one do either pay debts of the testator, or receive debts, or make acquittances for them, or demand the testator's debts as executor, or give away goods which were of the testator's, or deliver money of the testator's fees about proving the will; all these be full and clear administrations as executor. But, saith Fitzherbert, if he only lay out his own money for fees, this is no administration; so saith Plowden, if he pay debts with his own money, and if he do it about the funerals. But some difference may be between acts done by one named executor and by a stranger, *viz.* to make him executor of his own wrong; whereof we shall speak after, not in this place. If one being sued as executor take it upon him, and plead in bar as executor; this is an administration.

9 Ed. 2, 13, 14.
33 H. 6, 31. a.

Of the Force and Effect of Refusal.

As to the third point, *viz.* the force or effect of refusal; first it is clear that if there be but one executor, and he do refuse, or being many (C

Cook, 1. 5. 28.
Cont. 18. E. 3.
Bro. 8, 7.

(a) One executor may refuse, and yet afterwards administer or release a debt, but otherwise it is if they refuse before the ordinary: and probate of wills in the spiritual court before the ordinary hath been but of late times, &c. and they have not the same by the spiritual law but *Consuetudine Angliæ, et non de communi jure*. And after they have proved the testament, their authority is executed and they have not the power to take the refusal of any, when any of the executors prove the will. And much more concerning

if they do all refuse, then is the party dead intestate, and administration is to be committed with the will annexed, as is before said, nor can any after meddle as executors. But in case there be divers executors, viz. *A. B. and C.*, and *A.* only refuseth, and the will is proved by the others, there *A.* continueth executor notwithstanding his refusal; so as he still may release debts of the testator, and debts owing by the testator may be released to him; yea, if suit be to be had by or against the executors, it shall not be in the name of *B. and C.* only, but *A.* also must be named as a plaintiff or defendant, else the action may be overthrown (*a*). For the will being proved, all the executors therein named stand and continue executors, notwithstanding any of their refusals; as it was resolved in the latter end of the

22 Ed. 3, 19.

15 Ed. 3.

Exec. 8.

41 Ed. 3, f. 22.

21 Ed. 4, f. 24.

cerning the power of the ordinary in probate of wills, granting administration, &c. and the statutes concerning the same, see in Coke's 9 Rep. 37, 38, 39, 40; *Hensloe's Case*. Two executors prove the will, the third refuseth, yet he may release. Coke's 5 Rep. 28; *Middleton's Case*.—(C.)

(a) The proving by one executor is sufficient for all. Coke's 9 Rep. 34, 35, 36, 37, 38, 39, 40. *Hensloe's Case*.—If there be three executors named in the testament, and two refuse, the third may prove the will alone, and yet the other two may meddle with the goods when they will, and either of them when they will. And if an action be brought, it ought to be brought in all their names, notwithstanding such refusal. Touchstone of Prec. 29. And the executor who proveth the will must name the other executors in all actions for debts, and they may release the whole debt; and they that refuse shall have an action by survivor, —(C.)

44 El. Co. 9.
f. 26, 27.
4 & 5 Ph. & M.
Dyer, 169, c. 6.
Contra 21 E. 4,
23, 24.

late queen's time, according to divers former resolutions. And therefore this executor which hath refused may afterwards administer at his pleasure, and intermeddle with the goods as well as the others(1); yet, saith Brook, chief-justice after the death of his companions he cannot do; but then the executor of him who proved is only to administer, *quod non est lex*. There may be some difference between suits by executors, and suits against executors: for when they themselves sue, they being privy to the will, and having the custody of it, must bring their action in the name of all the executors, according to the will; but he that is to bring an action against them need not perhaps take notice of more executors than those that have proved the will, or otherwise do administer(a); for it is no good

(a) Debt against an executor, who pleaded that J. S. is co-executor with him not named in the writ, judgment of the writ, but doth not aver that the other had administered upon which the plaintiff demurred, and the plea was adjudged ill: for although when an executor sueth, the defendant may plead another executor not named, without showing that the other hath administered, for he may not know whether he hath administered or not; yet when an executor is sued, if he pleads another executor not named he ought moreover to say that he hath administered, for that lieth in his knowledge. Lev. 1, p. 161; *Swallow v. Emberson*; and 2 Stra. 1220.—(C.)

(1) 5 Co. 28; 9 Co. 36, b.; 11 Vin. Abr. 55, &c.; Burr 1436; 3 Atk. 239; 3 P. Wms. 251; 1 Bl. Rep. 456; Salk 311. And then administration cannot be granted until the last surviving executor hath refused. Salk. 308.—(E.)

plea for themselves, in an action against them, to say, there is another executor, without saying also that he hath administered, as it seemeth by divers books. Nay, one book in the time of Hen. 8. Swinb. 395.

goeth farther, viz. That if the suit be brought against all, yet one of them not intermeddling with the proving of the will, may plead that he was never executor, nor administered as executor. 33 H. 6, 38. a.
Co. 9, 37, b.
32 H. 6, 25.
27 H. 8, 11.
per totam curiam.

By this it should seem that executors refusing (I mean all of them, so as no will is proved) they in an action against them may say that they were never executors: but methinks, they should not so plead, but show the special matter, as was done in the time of Edward the Fourth. 9 Ed. 4, 33.
Co. 9, f. 86.

As for relation I will forbear to speak, till I come to proving; for that probate and refusal stand in the same state as touching relation.

CHAP. IV.

OF PROVING WILLS.

NOW let us see touching the Probate of Wills what is considerable^(a); and therein of these three or four parts:

(a) A will which doth only concern lands ought to be proved in the Chancery; but if it be a mixed will, and con-

1. Where, and before whom, and how the proof must be.

2. What shall be *bona notabilia*, to entitle probate.

3. What force or validity either a right or erroneous probate hath.

4. What relation either probate or refusal hath

As touching the first point, viz. How, at where, and before whom wills are to be proved briefly thus :

Wills proved in some manors by prescription.

The proving is in the spiritual court (1): y

cerns lands, goods, and chattels, it may be proved in the spiritual court (1).

A will of lands need not be proved in the spiritual court but a will of goods must be proved there, otherwise he can bring no action. Cro. Car. 165. In the case of *Hill v Thornton*, a consultation was granted to proceed *quod bona*.—(C.)

(1) If the will relate wholly to real property, the Ecclesiastical Court hath no power, and ought not to grant probate; and in case of a suit to compel it, a prohibition lies but if it be of a mixed nature, it hath jurisdiction, and the probate is entire. 4 Burn Eccl. L. 195; 11 Vin. Abr. 660, 117; Cro. Car. 397; and see 2 Ves. jun. 230.—(E.)

(1) This is done commonly by his own oath, though in some of the dioceses of the province of York the addition of one witness is required; but if the validity be called in question, or the executor prefer for his own safety to have it more solemnly propounded, it is then to be proved by the examination of two witnesses at least, in the presence of the widow or next of kin. 3 Bac. Abr. 39; 4 Burn Eccl. L. 205, 208; Godolph. 65; 1 Ought. 20; Swinb. p. 6, s. 14. In such case, if the will be disallowed by the rejection of witnesses or other informality in the mode of proof, as this is

in some manors, by prescription (a), wills are to be proved before the steward, though no lands thereby pass, as appears by divers books: and

2 R. 3 Fitz.
Co. lib. 9, f. 43.
3 Bac. Abr. 39.
Silk. 41.
1 Cowp. 286.

(a) The probate of wills by common law belonging to temporal courts, and in some places in England the lords in their courts, as court-baron, or other courts have probate of wills; and the executors have a temporal right and interest by the wills, and the probate giveth them no right or title: but the judges are not willing to admit them to bring actions without showing the will duly proved under seal of the ordinary. If a lord hath probate of testaments made within his manor, he cannot prove a testament made out of the precinct of his manor. Coke, 2 Inst. 231.—(C).

matter exclusively in the jurisdiction of the Ecclesiastical Court, no mandamus will lie to compel probate thereof. Ib. and 1 P. Wms. 12. On such proof, it is sufficient if the witnesses swear to the testator's declaration that the instrument produced was his last will and testament, or that he executed the same. Ibid. Where there is only one attesting witness, there must be the testimony of one other person to the same effect. And it is equally effectual though the will or codicil be neither written in the hand-writing, nor signed by the testator, nor published in the presence of the attesting witnesses, if it be shown to have been drawn by his instructions, and read over and approved by him. Ibid. and *vide* Com. R. 450, *et supra*. When the will is thus proved, the original is deposited in the registry of the ordinary, and a certificate of such proof, with a copy of the will on parchment, made out under the seal of the ordinary, is delivered to the executor. Such copy and certificate are called the probate. 11 Vin. Abr. 56, 7; 4 Burn Eccl. L. 205.

If the executor be resident at a distance, or abroad, or infirm, the oath may be taken under a commission issuing out of the Ecclesiastical Court, directed to some person competent to administer the oath. 4 Burn Eccl. L. 208. The granting probate by a metropolitan ordinary or other person,

in the manor of Mansfield is this prescription and in others, whereof Tremaine was steward in King Richard the Third his time, as he declared And the like I may tell of my own knowledge touching the manors of Cowley and Caversham in the county of Oxford, where I have kept the court of the Lord Viscount Wallingford, and found it is

being wholly a ministerial act, may be performed by himself or by his official. 3 Bac. Abr. 39; Cowp. 140. And it is power annexed to the person, and may be exercised out of his diocese. 3 Bac. Abr. 39; 11 Vin. Abr. 78; Cro. Car. 53. And in case of a vacancy by death or suspension, the dean and chapter shall exercise it. Ibid. and Lutw. 30.

If there be several executors, though with distinct powers yet if there be but one will, one probate shall suffice, for it shall be taken *reddendo singula singulis*. 3 Bac. Abr. 30. And if one of several take it out singly, and afterwards another apply, it shall be granted in like manner, but only it shall recite the former grant. 4 Burn Eccl. L. 201.

So the probate shall follow the will, as if it dispose only of particular effects, or the testator hath only a limited disposing power, the probate cannot give his representative a greater disposing power than he himself had: and if it be power given limited by a deed, that must be produced unless the party interested, as a husband in respect of his wife's estate, consent to the grant of a general probate. If only a limited probate be granted, administration *de bonis non* must be taken out. If any disposition contained in the will be disputed as a forgery or fraudulent interpolation, and it be decreed as such, the probate shall be granted with reservation of such part, and the copy of the will annexed be engrossed without it. 4 Burn Eccl. L. 209; 1 P. Wms 388.

But the court can in no case construe a will with reference to the instructions given for preparing it. *Murray v. Jones* 3 Ves. & B. 318.—(E).

present and frequent use. And it is said by the judges in the time of King Henry the Seventh, that this proving of wills in the court spiritual is not ancient, but of later time(1). Yea, it is acknowledged by Linwood, the dean of the arches, that it pertains not to the spiritual court of common right; nor is so in use in other kingdoms. The reason why the law of England hath herein given way to the ordinary and court spiritual, is said by Walsh, in *Greysbrook* and *Far's Case*, to be the piety and integrity which is presumed to be in those of that function, having charge of souls. Indeed they are, as it seems to me, executors of the New Testament, or last will and testament of Jesus Christ, whereby great legacies and gifts are given to men, and by pastors to be dispensed and distributed: of which distributors it is required, as St. Paul saith, "That they be found faithful." And happy are they who with him can plead, *plene administravit*, viz. that they have fully administered, as he did; much depending thereupon, viz. God's honour, the blessing, prosperity, and safety of the country, the piety, justice, conscience, contentation and salvation of men. As for wills proved in London(a) and Oxford before the mayor, that is

11 H. 7, 12.

Why this jurisdiction given to court spiritual.
Plow. Com.
279.

1 Cor. 4, 2.
Act. 20, 27.

Proved in London and Oxford, before the mayor.

(a) When a man maketh a devise of lands in London, and also of his goods, then first the executors shall prove the

(1) It is said to be founded on an original composition between the owners of such peculiar jurisdiction and the ordinary. 3 Bac. Abr. 39; 11 Vin. Abr. 77.—(E.)

only in respect of the burgages within those places devisable; but they were to be proved also before the ordinaries in respect of the goods, and there only where no lands are bequeathed.

same before the ordinary, and then after they shall bring the same before the mayor into London, &c. and it shall be there enrolled; and then upon that enrolment the mayor, upon *ex grossi querela*, sued for the lands, shall do execution, and such process as upon a fine of lands, &c. And by the writ it appears, that a man may have a writ to the mayor to compel the executors to bring in the will to be proved before them in London; and to be enrolled in the hustings. The same in Oxford. And thereby it seems reasonable it be so done in every other city where lands be devisable, that the executors and devisees shall have such actions against the ordinary; and also of the bailiffs of the towns and boroughs to prove such wills. *Vide plus*, and the forms of the writs. F. N. B. 459, 460.—(C.)

The writ is *secundum cons. in eadem civitate hactenus obtentam et approbatam*, &c.

If the mayor, &c. will not prove the will, the devisee and executors may have a writ to compel them, and thereupon an *alias et pluries*, and an attachment if need be.

No testament may be enrolled in the hustings, in London, unless the testator put to his seal: but testaments that may be found good and legal are effectual, although not enrolled or of record.

The testament there ought to be adjudged effectual and executory, having regard to the testator's will, although the words be defective, and not according to common law.

And as lands and tenements, so rents and reversions, may be there devised, and distress made for them, without clause of distress. City Law, p. 4, 5.

Where and how persons inhabiting in the province of York, and in Wales, may by will dispose of their personal estates, see the statutes 4 and 5 W. & M. c. 2, and 7 and 8 W. 3, c. 38.—(C.)

By 2 Ann. c. 5, the privilege given by 4 & 5 W. & M. to dispose of their personal estates as they think fit, is extended to the city of York, excepted out of the act of W. & M.

The proving then is to be before the ordinary (a), general, particular, or special. By general, I mean

(a) All wills and testaments are proved and recorded with the registrar of, 1. The prerogative. 2. The proper diocese. 3. The peculiar: or 4. The visitant for the resident.

In all cases where the deceased hath or had goods, chattels, credits, or other personal estate, to the value of five pounds, or upwards, at the time of his decease, out of the diocese where he lived, and was resident or died, the will of the deceased is proved and recorded in the Prerogative for the whole estate. The records of the Prerogative Court are as ancient as *Sept. Ric. Sec. A. D. 1383*. And it hath none more ancient, as appears by their kalendars, which are with very good order made up and disposed. For all such wills as are of more antiquity, you shall search for them with the general register of the archbishop, in whose office both these businesses were carried till the division of the same, made at the time aforesaid.

The same rules and observations are to be held in matter of administration of goods, &c.

In case where the whole personal estate of the deceased doth or did, at the time of his decease, remain or be within the diocese where he lived, and was resident or died; so that the value of five pounds, or upwards thereof, is not or was not (at such time) in any other diocese; the will of such deceased is proved and recorded in the proper diocese, with the registrar of the archdeacon, or his official of course, or the commissary.

And in the bishop's visitation, with his chancellor or commissary, with reservation only to the peculiars, together with the benefit of general visitation.

Note, That by reason of the familiarity between the bishop's commissary and the archdeacon, commonly you may find wills, not being of prerogative nature, so soon (sometimes) with the one as the other.

The like rule is of administrations in the diocese.

Only note, That sometimes you shall find wills proved, and

the metropolitan or archbishop, before whom it is to be proved (1); in case the testator have goods valuable, called *bona notabilia*, in divers dioceses whereof he is superior.

administration granted, in several dioceses (*quoad*) unto several parts or parcels of the estate of the deceased, lying and being at the time of his death so separated and divided: and sometime those which of right are proved, or granted and recorded in the Prerogative, to be likewise called to be proved or recorded in the proper diocese.

For such wills as fall in time of visitation, either of the archbishop or bishop of the diocese, you must search for them according to the rule of their times, and years of their visitation, wherein they are very certain.

Heretofore, when the pope had power of visitation in England, he took likewise probate of wills, &c., which may be very well now missing *inter alia*.

You may note, That there be some wills of the deceased, which cannot be found with the registrar of any court Christian, and yet are extant in the chapels of the rolls of Chancery, or the Tower, in their offices *post mortem*.

And lastly, some wills which cannot be found either with the registrar of court Christian, or in Chancery, may (in case, *inter alia*, where the deceased hath devised any thing to any society or body politic) be found enrolled in the house, college, hospital, hall, abbey, &c. to whom such things were devised, or amongst the records of such societies dissolved,

(1) This is by special prerogative, and the courts of the provinces are accordingly called the Prerogative courts and offices of Canterbury and York. Each of them has a supreme jurisdiction, and the one cannot intrude into the province of the other. 3 Bac. Abr. 36; 11 Vin. Abr. 79. 56.8; Swinb. 6, s. 11, pl. 7.--(E.)

amongst the evidences of such, unto whom the same things
so given have since come, if you pursue the same.

Executors come to prove a will, the ordinary must do it
ex communi jure; but if other executors come to prove a
latter will, it must be *per testes*. Hetley, p. 77.

The ordinary, &c. shall not be charged for putting their
seal to a will, not knowing the same to be forged. Wing.
Abr. Forging of Deeds.—(C.)

Of bona Notabilia.

WHAT shall be said to be *bona notabilia* is
considerable; for thereabout hath been much di-
versity of opinion: some holding that they must
be of forty shillings value, some five pounds,
some ten pounds; yea, some that the value of a
penny sufficeth to draw it to the archbishop from
the particular bishop (a). But that difference of

Can. 92, 93.
Jac. 1.

(a) The Prerogative Court of Canterbury, where all testa-
ments are proved, when the party dying hath *bona notabilia*,
in some other diocese within that province, which regularly
is to the value of 5*l.* but in the diocese of London it is 10*l.*
by composition (1). The bishops, lords and commons assent
in Parliament, that the King may make his testament, and
several instances thereof. And if the King be made exe-
cutor, he appoints persons to execute it. The probate of
every bishop's testament belongs to his archbishop; (Coke's
4 Inst. 335. 338; 3 Bac. Abr. 37;) although he hath left
goods only within his own diocese. 4 Inst. 335; 11 Vin.
Abr. 74.—(C.)

Swinb. 414.

(1) If a testator hath goods in several peculiars in one

opinion I conceive to be now cleared by a canon made in the first year of King Charles his reign

diocese, yet shall the metropolitan grant probate, for such are exempt from the jurisdiction of the ordinary. P. Swish. p. 6, s. 11; Gibs. Cod. 472. And if it be a peculiar in the episcopal diocese of the archbishop, it is said there must be several probates. 4 Burn Eccl. L. 191; Cro. Eliz. 719. When a testator hath goods in England and Ireland several probates must be granted in each kingdom, regulated according to the respective jurisdictions in which *bona notabilia* arise, for there is no common superior jurisdiction. 3 Bac. Abr. 36; Gibs. Cod. 472.

If he had effects also in Scotland, the will is proved in the Court of Great Sessions there, and a copy duly authenticated is transmitted and proved in the Prerogative Court in England, as an original will. So in cases where the testator dieth in the East or West Indies; and where probate has been taken out in England, the judge of probate in any of the colonies is bound by it, and must grant probate of goods within his jurisdiction to such grantee. Amb. 415. If the testator's property be wholly abroad, probate according to the custom there is sufficient; (1 Vern. 397;) but if the will made abroad contain any disposition of goods here, probate must be taken out in the Prerogative Court accordingly. 11 Vin. Abr. 58, 59. 69. If the will be in a foreign language, the probate is of a translation by a public notary; Toller, 71.

But where the testator not being *in itinere* dieth in a diocese where he hath no goods, and having *bona notabilia* elsewhere, the metropolitan shall grant the probate. 11 Vin. Abr. 80; 3 Bac. Abr. 36; 4 Burn Eccl. L. 189. So where the testator hath goods only in one diocese, and dieth beyond sea. If the testator dieth in one diocese, having *bona notabilia* in another, though he hath not goods to the value of 5*l.* in any other diocese, yet shall this suffice to give the metropolitan jurisdiction. 3 Bac. Abr. 37; Godolp. 69.

So goods to the value of 5*l.* only, lying in several dioceses,

Convocation then held, whereby it is established, that five pounds shall be the sum or of *bona notabilia*; yet therein is this *proviso*, here by composition or custom in any diocese *bona notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise hereby provided, that if any man die *in itinere*, viz. in his journey or travel, the goods

Canon law made
1 Jac. c. 9.

he then hath about him shall not cause administration shall be committed, or the will left, before the metropolitan.

Being considered of the value, now another observable is, what things shall be said to be *bona notabilia*. And as to that, debts owing by the testator are *bona notabilia*, as well as goods in possession, their value being answerable: yet, if the penal sum of the bond be but five pounds for payment of a less sum, although the bond be forfeited, yet in the spiritual court in respect to conscience suppresseth the fact of executors, this will not be taken to be *bona notabilia*, viz. of five pounds value, although

Swinb. 418.

to *bona notabilia*, subject to the superior jurisdiction, neither of the inferior jurisdictions could grant probate whole. Ibid.

If a man be only occasionally commorant in a house within another diocese, though it be but for ever so short a period, and dieth there, not leaving *bona notabilia* in the diocese where he was usually resident, probate shall be granted in the diocese where he died, for he cannot then be considered as dying, *in itinere*. 4 Burn Eccl. L. 191; 1 Salk.

21 Eliz. and vid.
11 Vin. Abr. 80.

Goods consider-
able or conspi-
cuous.

though in law the whole penal sum be a duty (1). But if the debt be five pounds or more, though it be desperate, or due from the King, against whom no suit can be, but only by petition, yet this will stand for, and as *bona notabilia*, as I take it, in the court spiritual; though thereabout I can but conjecture, since the rules of our law determine it not. And this point, touching the King's being debtor, I find debated in the late Queen's time, but not resolved, so far as I find. But there Popham at the bar urged that no debt should be *bona notabilia*; and if it should, yet not such for which no remedy by suit, as in that case, the Queen being debtor. Yet a farther question local is touching these debts or things in action, in what place or diocese they shall be said to be as *bona notabilia*, viz. whether in the place where the debtors be, or where the obligations, or other specialties be (2)? And as to this,

(1) And now by stat. 4 & 5 Ann. c. 16, s. 13, the penalty is saved by payment into court of the principal, interest and costs.—(E.)

(2) The distinction is taken between debts by specialty, as bonds, recognizances, statutes, or judgments, and those by simple contract; the former are held to be *bona notabilia*, where the securities are at the time of the testator's death; thus a debt on record which is at Westminster is *bona notabilia* in that diocese; (3 Bac. Abr. 37; Shep. Touch. 463;) but debts on simple contract follow the person of the debtor, and accrue to the executor in that diocese where the debtor resided at the time of his testator's death. 11 Vin. Abr. 77, 80; Carth. 149; 1 Salk. 40; 3 Salk. 164.

But to obtain an order for any payment of money out of

the law hath been taken, that because the persons of the debtors be moveable, passant and transitory; therefore these debts shall be said to be, and to make *bona notabilia* where the bonds or other specialties be, and not where the debtors inhabit and dwell. And so was it not long since conceived by Justice Walmsley and Justice Beaumont in one *Pretymen's Case*, no other contradicting it. Herein therefore many are mistaken, who only in respect that the persons of the debtors do dwell in foreign dioceses, other than the places of the death of the testator, or where his other goods where, do take administration in the Prerogative Court, though the specialties remained where the party died, or his goods residue were. But in case the debts be only by contract, without specialty, then indeed they are to be esteemed *bona notabilia*, there and in that place where the debtor is, as the said judges well conceived the difference. But in case land be given to executors for payment of debts or legacies, this shall not be *bona notabilia*, as I take it, though it be assets.

Bona notabilia
where the Specialties be.

Hil. 17 Eliz.
M. Com. Da.
Vide 13 & 14 E.
Dy. 305.

Bona notabilia
where the debt-
or is.

the Court of Chancery, a prerogative probate is indispensable. 7 Ves. jun. 409; 12 Id. 417.—(E.)

Of the validity and invalidity of Probates.

22 Eliz.

Because by no means he can have jurisdiction of that cause which belongeth to his superior.

Where one hath bona notabilia in both the provinces of Canterbury and York, how proof to be; and vide supra 98.

As to the third point we will first see of the validity an erroneous proof is, and thereabout shall find this difference (a). Admitting that hath not *bona notabilia* in divers dioceses, so of right the proving of the will appertaineth to the metropolitan, and yet the will is proved before him; this is not merely void, but still in force till it be reversed by some sentence of appeal; as was resolved between Vear and Jeries, in the late Queen's time. But on the other side, in case one have *bona notabilia* in divers dioceses, or a peculiar and a diocese, yet the will is proved before the particular bishop within whose diocese part of the goods are; this is merely and utterly void, without any reversal. So also of proving in some peculiar. And in case one have *bona notabilia* both in the diocese of Canterbury, and in the diocese of York; the will must be proved either before both metropolitans, if within each of their jurisdictions there be *bona notabilia*, in divers dioceses; or else I take it, if there be not so in any of the places then before the particular bishops in those several dioceses where the goods are. Or, if wi

(a) Not void, but voidable, for that the metropolitan jurisdiction over all the dioceses within his province, and that cause it cannot be void, but only voidable by sentence.—(C.)

the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese; then in the one place is the will to be proved before the archbishop, and in the other place before the particular bishop, as I conceive (1). And so also of peculiar jurisdictions. And in some places archdeacons have peculiar, or jurisdiction ordinary, and power to take probates of wills, and grant administrations. But where any like error or misproving is in these respects, it is cause of reversal or of nullity, according to the former difference (a); so also if there be falsehood in the proof, were it *communi forma*, that is, without witnesses, or by examination of witnesses; yet may it in the spiritual court be undone (2), if either disproof can be made, or

(a) If a will be proved before the metropolitan, where there is not *bona notabilia*, and so it ought not to be proved there, yet it standeth good till it be reversed by some sentence of appeal; but if it be proved in any inferior court where it ought not, it is merely void. Coke's 8 Rep. 136; 5 Rep. 30; and 1 Rep. 150. For the metropolitan hath jurisdiction over all the dioceses within his province. 3 Bac. Abr. 36; 4 Burn Eccl. L. 193.—(C.)

(1) 3 Bac. Abr. 36; 11 Vin. Abr. 76; 2 Lev. 86; Salk. 39.—(E.)

(2) The probate is suspended by the entry of a *caveat* in the spiritual court, which continues in force three months, during which time probate cannot be granted: it seems to be considered to operate as a *supersedeas* at common law. 1 Lev. 186, and 3 Bac. Abr. 41. Where probate has been improperly granted, an appeal is given within fifteen days after such grant by stat. 24 H. 8, c. 12, and so in each case where

proof of revocation of that will was once made, or of the making of a later (a).

(a) But probate of a will of lands in the spiritual court is no evidence at the common law; the witnesses being there examined, their examinations shall not be given in evidence at common law. So that the heir cannot be prejudiced by such probate of a mixed will. Cro. Car. 396, *Netter's Case*; 1 Bulst. 199, *Semain's Case*.—(C).

where it is successively prosecuted in the diocesan's court, or that of the archbishop, called the Court of Arches, before the metropolitan himself, or the court of delegates. If the King is a party the appeal is to the bench of bishops, in the upper house of convocation. Although the sentence of the court of delegates is declared by stat. 25 H. 8, c. 19, to be final, being in fact the result of the appeal to the King in Chancery; yet *ex favore* the King may grant a commission of review; this is however never done but under special circumstances. 4 Ves. jun. 205.

If the probate is affirmed, the course is to send back the cause to the original court granting it; but if it be reversed, the sentence becomes an original one, and the court pronouncing it grants probate *de novo*, thereby ousting the inferior court of its jurisdiction; (11 Vin. Abr. 76; Com. Dig. Adm. b. 2;) and all intermediate acts by the executor are thereby rendered void. In some cases equity will relieve against payments. 1 Ch. Cases, 126.

The probate is the only evidence of a right to personal property. *R. v. Inhab. of Netherseal*, 4 Term R. 258.

And so long as it remains unrepealed cannot be impeached in the temporal courts. *Allen v. Dundas*, 3 Term R. 125. But evidence which admits and avoids the probate, either as to the seal of the court, or its jurisdiction by reason of *bona notabilia*, is admissible. Burn Eccl. Law, 196; Str. 671; and see 11 Vin. Abr. 89; Com. R. 152; Roll. Abr. 919. If the question be as to a forgery no indictment can

Now, admitting the will true and right, and also rightly proved (1); let us yet see the force and strength of the proof or will so proved. It

be maintained thereon until the Ecclesiastical Court has pronounced it such. 3 Bac. Abr. 34; 1 Str. 481. 703.

And that within thirty years when the will is proved in the common form; but when it is by a suit in chancery, to which all parties interested therein have been made parties, and no time limited by the decree for appealing, it cannot be afterwards controverted. 4 Burn Eccl. Law, 207; Godolph 62.

And before revocation of a former probate no new one will be granted. 4 Burn Eccl. Law, 193; 7 Mod. R. 146.

So where probate had been granted of an officer's will, who had been left for dead on the field at Corunna, on motion the court revoked the probate so granted in error, and the party himself appearing, the judge on his petition, decreed the will, with the probate being first cancelled, to be delivered out of the registry. *Ex pte. C. I. Napier*, 1 Phill. Eccl. R. 83.—(E.)

(1) Probate will in general be good of a testamentary paper, although neither subscribed nor sealed, if the testator's handwriting be proved, which must be done by two credible witnesses; if attested, one will be sufficient in addition to such attesting witness. But although neither attested, nor in his own handwriting, it will be equally effectual if shown to have been read over and approved of by him. 2 Bl. Com. 501; Godolph. p. 1, c. 21, s. 2; Com. Rep. 451. If there is a difference of opinion as to its being the testator's handwriting, the Ecclesiastical Court will receive evidence of persons competent in such matters. *Beumont v. Perkins*, 1 Phill. Eccl. R. 78.

A will has even been established upon answers to interrogatories taken down at the time by the solicitor, and read over and approved of by the party. *Green v. Skipworth*, 1 Phill. Eccl. R. 53. But such instructions must not have

9 Ed. 4, 17.
22 Ed. 4, 50.
22 H. 6, 22.

Plow. Com.
382.
44 Ed. 3, 32.
19 Ass. p. 2.

being under the seal of the ordinary cannot be denied, saith one book, to wit, whether this showed forth be a will proved or not; no though the proof be but indorsed on the back viz. that it is so proved, saith the book. But notwithstanding, the defendant so used may deny that the plaintiff is executor, as not being concluded nor estopped by the probate so to say (a). And the reason is, because the seal of the ordinary is but matter in fact, and not matter of record: nor are the sentences of divorce, and the like, in the spiritual court, judgments or matters of record, as hath often been held (1).

(a) Probate of a testament showed forth under seal of the ordinary, yet the other party may plead that he who is dead died intestate: so if issue be taken upon probate of a will or if administration were committed (although they show the bishop's letters testimonial) it shall be tried by jury. And of divers manners of proof and trial, see 9 Rep. 32, *Case of Abbot of Strata Marcella*.—(C.)

been left open to further consideration. *Devereux v. Bullock* 1 Phill. Eccl. Rep. 60.

A paper importing to be a deed of gift, yet if only to take effect after the death of the grantor is a testamentary paper *Thorold v. Thorold*, Ib. 1.—(E.)

(1) But a payment to an executor, who acts under such a false will, is a discharge to the debtor, although the probate be afterwards declared null, and administration be granted to the next of kin. *Allen v. Dundas*, 3 Ter R. 125.

A payment of money under a probate of a person still living is void, for the probate can have no effect. Ib.—(E.)

Of the relation of Probate and Refusal.

As for this last point, both the proving and the refusal shall have relation to the death of the testator, as I take it, to divers purposes. So as to the proving, saith the Lord Dyer expressly and confidently in *Greysbroke* and *Fox's Case*; and the resolution also of the case proves it. For there administration being committed before any will proved or notified to the ordinary, as it should seem, the administrator sold some of the goods to *J. S.* and after the executors (proving the will) brought an action of *detinue* for those goods against *J. S.* who pleaded this administration and sale; and thereupon the executor demurred; and judgment was given for him, as having by the proving of the will disproved the administration *ab initio* (1). But it is true that judgment was given only by two judges; one being absent, and the other dissenting in opinion; yet I think it was right and according to law, and that refusal shall have the like relation; else could not the administration relate to the death of the intestate, as it doth to some purposes, expressed in divers books, *viz.* to have the action of

Proving.
Plow. Com.
281. 283.

18 H. 6, 12. 2.
9 Ed. 4, 33. 47.
Not to make
good a release
made before.
Co. lib. 5. 18.
Refusal.
39 H. 6, 8.
2 Ma. Dy. 110.

(1) And see 11 Vin. Abr. 205; 9 Co. 38; 1 P. Wms. 767; 1 Atk. 461; C. Ch. 2, 56; 1 T. R. 480; 4 T. R. 260. But not to affect or prejudice the rights of third persons. 3 Lev. 57. —(E.)

THE OFFICE OF AN EXECUTOR.

trespass for goods taken before administration committed, and to have a rent growing payable in that mean time.

What Fees are to be paid upon Probate, or for Copies of Wills or Inventories.

Per stat. 21 Hen. 8, c. 5.

1. *Where the goods amount not to above five pounds only six pence to the scribe.*
2. *Where they be above five pounds, but under forty pounds, 2 s. 6 d. to the B. B. 12 d. to the scribe.*
3. *Where above forty pounds, to be taken but 2 s. 6 d. to the B. B. 2 s. 6 d. to the scribe, or 1 d. for each ten lines of ten inches long, at the scribe's choice.*

THESE sums are to satisfy both for proving, registering, sealing, writing, praising, making inventories, giving acquittances, fines, and all other things concerning the same.

Where land is given to be sold, neither the money raised, nor the profits thereof shall be accounted as any of the testator's goods or chattels (a), saith the statute (1).

(a) If a man by his will devise his lands to his executors for payment of debts, and until his debts be paid; in this

(1) 21 H. 1, c. 5, s. 5, and although a distinction prevailed formerly between a devise to a trustee and to an exe-

Note, That the will is to be brought with wax thereunto ready to be sealed, and proof to be made of the will according to common custom.

case the executors have but a chattel and an uncertain interest in the land until his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of his debts. But otherwise it is if a lease be made to a man untill one hundred pounds be paid; for there, because the rents are uncertain, the lessee hath an estate for life determinable upon payment of one hundred pounds. Coke's 1 Inst. 42, a, and see 8 Rep. 94, *Manning's Case*.

It was moved to have writings brought in by the defendant to have a special verdict at the assizes drawn up, where the case would be, that a man devised his lands to his executors to be sold for payment of his debts, and the lands being sold, if the money in their hands must be assets at common law to charge them in debt; the writings were ruled to be brought in, and Twisden, justice, said that he had known it to be adjudged that they were assets at common law, without going to chancery. 2 Lev. 224, *Dethicke v. Caravan*.

Cestuy que use declared by his will, that *J. S.* should have as well the governing and ordering of his children, as the disposing, letting, setting and ordering of his lands: whether *J. S.* might sell the lands by these words was the question. By the opinion of the court he might not; forasmuch as the meaning of the deviser should be collected, that he would that his lands should be disposed and ordered according to

cutor, it has been by late decisions altogether abolished. 1 Bro. Ch. Rep. 137, and Ap. 6; 2 Ib. 94; 2 P. Wms. 552; 8 Ves. jun. 26; 2 Fonbl. Eq. 398, n.; Co. Litt. 113; Harg. n. 2.—(E.)

How the inventory to be made.

For making the inventory, the executor is to take or call to him two creditors or legatees of the testator, and do it in their presence; or in their absence or refusal, two honest persons being the next of his kin; or in their default two other honest persons (*a*).

good order, and for the benefit of his children. But it should be ill ordered to sell the lands of the children. *Per Fitzh. Dyer* 26, pl. 120.—(C.)

(*a*) When an executor intends to accept of the office, it behoves him to make an inventory of the testator's goods; for if he meddle with the goods, and refuse to make an inventory, he may be punished by the ordinary: but he may meddle with the goods as to the discharging of funerals, or disposing of such things as cannot be preserved, and

(1) So by 22 & 23 Car. 2, an administrator must enter into a bond with one or more sureties, conditioned to exhibit into the registry before a particular day a true inventory of the intestate's effects which come to his possession. 3 Bac. Abr. 46; 11 Vin. Abr. 358; Salk. 251.

And such inventory must also be exhibited by the executor within a reasonable time, to be computed at the discretion of the ordinance, with reference to the residence of the party, distance of the goods, &c. P. Swinb. p. 6; 4 Burn Eccl. L. 265. And the judge may cite either of them, at the suit of a party, or of his own discretion. Id. 250; Com. Dig. Admin. B. 7 *sed vid.*; 5 Mod. 247. In general, however, this formal inventory is not exhibited or required, unless cited at the suit of a creditor, legatee, or party entitled to distribution, in which case his general oath is not sufficient, but must be specially verified in person, or by commission. 4 Burn Eccl. L. 250, 265, 266; Swinb. p. 6, s. 6; *Philips v. Bignell*, 1 Phill. Eccl. L. 239; and *Myddleton v. Rushout*, ib. 224. The effect of not making such inventory is, that in case

The inventory is to be indented, and one part

kept until the time of making the inventory. P. Swinb. p. 6, s. 6(1).

Note, That the goods in the inventory ought to be particularly prized and valued according to reasonable prizes,

case of a deficiency of assets, the presumption is against him, and he must show that no others than those accounted for by him came to his hands; whereas the assets exhibited in an inventory are conclusive in his favour until the party questioning it gives evidence of others; and the appointment is also to be deemed just, though not made strictly according to the statute, until falsified (*ib.* and 1 Ought. 344); and the Ecclesiastical Court may dispense with it altogether. Raym. 470. So, that court, under special circumstances, will decree such inventory to be specially verified before probate, &c.; or a commission of appraisement (4 Burn. Eccl. L. 266); in which case a monition issues to all parties having any of the deceased's effects, requiring them to exhibit the same to such appraisers, in order to their being interred. This inventory, signed by them, or two of them at the least, of course dispenses with the oath of the party. 4 Burn Eccl. L. 266, 267; 1 Ought. 344, 345.

A creditor cannot impeach an inventory exhibited under the statute. *Ibid.* and 3 Burr. Rep. 1922: 2 Fonbl. 418, n. d. He may indeed state objections, which the court will require to be answered on oath; or he may seek relief by bill in equity. The oath taken by the executor now is, that the writing produced contains the true last will and testament of the deceased, as far as the deponent believes; and that he will truly perform the same, by payment first of the testator's debts, then legacies, as far as the goods, &c. will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all such goods, &c., and exhibit the same into the registry of the spiritual court assigned by the court, and render a just account thereof when lawfully required. Toller's Law of Executors, 58.—(E.)

left with the ordinary, and the other to remain with the executor.

and not huddled up together several things in a gross but those goods which do not belong to the heir after testator's death, must not be put into the inventory; nor may those goods called *bona paraphernalia* (which is the wife's convenient apparel, agreeable to her quality) be put into the inventory: but such is the general custom in the province of York, that widows are there not only told to reserve to their own use their convenient apparel, convenient bed and furniture, but also a coffer box and divers things therein; as jewels, chains, borders, and things necessary for their own persons. P. Swinb. p. 6.

Vide 4 & 5 W.
& M. c. 2, and
2 Ann. c. 5.

Note, The valuation on the appraisement of goods is binding, nor much respected at common law: if it be too high, it shall not prejudice the executor; if too low, it shall not advantage him, but the value found by the jury *plene administravit*, is binding. Raym. 470. 471.

Certain jewels to the value of 500 marks were allowed to a viscountess as her paraphernalia, and accounted a reasonable allowance for one of her degree. *Viscountess Bindon's Case*, More's Rep. p. 72, pl. 338.

If he does not,
she may claim
them, in case
there be no
debts. Agreed
in 2 Vern. 246.

The husband may dispose of his wife's paraphernalia by his will; and if he doth not, they go to his surviving wife, but she cannot take them without his executor's assent, unless the husband by his will especially appoint the executor, who may take them without such assent. Cro. Car. 343, *Hastings v. Douglas*.

But note, If the rest of the goods will not suffice to pay the husband's debts, then are the wife's jewels, chains, borders, and such like (being things of decency and ornament, not necessity), to be put into the inventory, amongst the goods of the deceased, towards the paying of his debts. P. Swinb. p. 6, s. 7, n. 5 *in fin.*

In this case
there were two
judges against

Note also, That the husband may devise such chain and jewels, &c. though he leave sufficient assets besides to pay his debts, and in such case the wife shall not have the

The executor is to make oath of the truth of it⁽¹⁾.

For a copy desired by any, either of a will or inventory, no more is to be paid than before is allowed for the registering; with the like election to the scribe or register, as is above said.

Mr. Swinburne saith, that an executor is to swear, that if it should be thought fit, to be bound to make a true account, when he shall be thereunto lawfully called by the ordinary. And of accounting some books of the common law make mention, as 13 Edw. the Third, Fitzherbert Exec. 91, where Trew saith, that of a thing in action no account shall be before the ordinary; but Parning

3 Bac. Ab. 45.
4 Burn Eccl. L.
250. P. Swinb.
p. 6, s. 8; and
must be duly
stamped.

See also 31 E. 3,
c. 11. An ad-
ministrators shall
account as an
executor, Fit.
Ex. 91, & 837,
viz. 18 E. 2, tit.
Briefe.
48 E. 3, 14, 15.
Of a duty rest-
ing in account it
is said, the le-
gatees shall have
remedy by ac-

her paraphernalia; but if the husband make no gift or devise of them, and leave assets besides to pay his debts, then the wife in such case may keep them in despite of the executors or administrators. Tr. 8 Car. 1 Br. R. *Lord Hastings and Sir Archibald Douglas's Case*, Cro. Car. 343.

If any creditor or legatary do affirm, that more goods came to the executors hands than are named in the inventory, he must prove it; for otherwise credit is to be given to the inventory. P. Swinb. p. 6, s. 10.—(C.)

two. It was in
trover on a spe-
cial verdict for
the jewels.
Vide 2 Vern.
246, that he
may devise
them

(1) By the custom of London, where the testator dieth, leaving an orphan within age and unmarried, the mayor and aldermen may compel an executor to exhibit an inventory at a court of orphanage, and to give security to account for debts when received, and on refusal may commit him until compliance. And this liability on the custom is not waived by his having before given security to the spiritual court. 1 Roll. Abr. 550; Com. Dig. Guardian (G. 1.) Hob. 247.—(E.)

count in the
spiritual court.
18 Ed. 4, f. 8.
Moyle.
4 Hen. 7, 15.
per Wood.
9 Ed. 4, 47.
Doct. & Stu.
78, b.
21 E. 4, 22.
Plowd. Com.
544. 4 H. 7.
16 Kialw.
Rep. 64, 2.

seems of a contrary opinion. And elsewhere it is said, that where a debtor is made executor to the debtee, he shall yet account before the ordinary for his debt: yea, as of money in possession, saith one; which others denied.

An executor by wrong shall be drawn to account before the ordinary, saith Moyle, justice. But saith St. Germain, he may not force any to account against the order of the common law (not showing what that is.) And *temp. Edw. the Fourth* it is said, at least by the reporter, that after the will proved, the ordinary hath no more to do: *quod non credo*.

Also of the oath of an executor divers books tell, but to no such purpose as Swinb. but truly to perform the will.

And now by stat. 4 Ann. c. 16, s. 26, the probate of wills and administrations shall be in the ordinary of the diocese, for persons working in the King's docks or yards, and the wages due to them shall not be deemed *bona notabilia*.

CHAP. V.

WHAT THINGS SHALL COME UNTO EXECUTORS,
AND BE ASSETS IN THEIR HANDS, AND
WHAT NOT.

THE things which shall come to executors are of great multiplicity, and would make a large and confused heap if tied together in one bundle or lump(*a*). I will therefore divide and sort them out in parts, after the best manner I can. First, we will divide them into things possessory, or actually in the testator; and things in action, or not actually in the testator. Secondly, the possessory into chattels, real and personal; or (as some less properly express it) moveable and immoveable(*b*).

(*a*) *A.* deviseth his land of inheritance in fee to his executors, and their heirs, not naming the executors by their names, and he makes *M.* and *N.* his executors, though they refuse to administer or prove the will; yet they shall take the land as joint-tenants in fee; for executors is a good name of purchase as well as right heirs. Moore, 806.—(C.)

(*b*) *Assets in mains l'executors*, is when a man indebted makes executors, and leaves them sufficient to pay, or some commodity or profit is come to them in right of their testator: this is called assets in their hands. *Termes del Ley, verb. Assets.* Sheph. Touch. 496.

Having spoken before concerning assets, it will not be improper to set down some general rule as to assets. First

present owner, or by assignment from the king or other lord of whom the tenure was) is a chattel real, not personal, though it be an interest in the person of another; but it is in respect of a tenure of land, or other hereditament, and is for years, *viz.* during the minority, or till marriage had, and so is real. Next, a villain for years (as by grant for a term from him that had the inheritance) is a chattel real. As for an apprentice for years, it is by custom, as I take it, that he goeth or is derived to executors but for reason after showed, I think this interest is not in the realty, but in the

and executor dies before probate, yet is the term vested, and the devise executed. Dyer, 367, a. So a lease *pur autre vie*, and the heir be not named in the grant: this, by stat. 20 Car. 2, c. 3, and 14 Geo. 3, c. 20, shall go to the executor and be assets in the course of distribution; and so of rents issuing out of incorporeal hereditaments. Har. Co. Litt. 41, b.; 1 P. Wms. 39; 2 Id. 380; 3 Id. 264; Pr. Ch. 167; Barnard, 46; Vaugh. 201; 4 T. R. 291. So a reversion of a term. 11 Vin. Abr. 240; 2 Jones, 170. And if he renew or surrender, he shall still be chargeable for the value as assets. 11 Vin. Abr. 227, pl. 16. 21; 3 Bac. Abr. 58; Shep. Touch. 497; 2 Ch. Ca. 280. Or if the renewal be made by the request of the lessee or his executor, pursuant to a covenant of the lessor, it shall be assets. 2 P. Wms. 196; Sheph. Touch. 497. But where a term is created only for a particular purpose, as on a marriage, it shall not be assets, nor liable in the executor's hands for the debts of the party interested therein. 11 Vin. Abr. 236; 2 Vern. 52. 213. 298. So when made on condition which is broken before the death of the party. 2 Leon. 143. Nor does the Statute of Frauds make a term held in trust, assets in the hands of the executor of the *cestui que* trust. 2 Vern. 248.—(E.)

personalty rather(1). So of a debtor in execution for debt, the interest in him, or perhaps more properly in his liberty, is not, as I conceive (for reasons which after I shall express), a real, but a personal chattel. The like law of a prisoner taken in the wars. As for fishes in a pond, coneyes in a warren, deer in a park, pigeons in a dove-house, where the testator had the inheritance, or but for life, in the pond, warren, park and dove-house, they are not chattels at all, nor go to the executors, but to the heir with the inheritance (2). If the testator were but a termor, they are to go to the executor, but as accessary chattels, following the estate of their principal, *viz.* the warren, park, dove-house, pond(3), &c.

If kept in a trunk or cage, &c. they go to the executor. Cro. Eliz. 372.

The real chattels not living, are either in houses or lands most usually, and that three ways: first, by lease for years(4): secondly, by

(1) And see 2 Stra. 1115. 1266; Doug. 70; 2 Ves. 35; and 5 El. c. 4; and *inf.* p. 56, n. 2.—(E.)

(2) 1 Roll. Abr. 916; 11 Vin. Abr. 166; 3 Bac. Abr. 64; Co. Litt. 8; 7 Co. 15, b; Com. Dig. Biens (B.)—(E.)

(3) 11 Vin. Abr. 166; Harg. Co. Litt. 8, n. 10.—(E.)

(4) So a tenancy from year to year is an interest which devolves to the representative. 1 Bl. R. 596; 3 T. R. 13; 6 Id. 295; 11 Ves. jun. 383; 15 Id. 236; and where of the value of 10*l.* a year, a residence thereon for forty days acquires a settlement, 6 T. R. 29; and a term of years, with a slight rent, is assets to the amount of the difference between the rent reserved and the full value. 11 Vin. Abr. 230, pl. 42; 3 Bac. Abr. 57; Shep. Touch. 498; Cro. El. 712, s. c.; Cro. Jac. 545.—(E.)

wardship of lands held by knights service; thirdly, by extent upon judgments, statutes or

So a lease for a year by a copyholder is assets in the executor of the lessee, for such lease is warranted by the general custom. 11 Vin. Abr. 146; Co. Litt. 59; Harg. n. 4; 4 Co. 26; 9 Co. 75, b; Poph. 188; W. Jo. 249; Litt. R. 233. So where granted for lives. 11 Vin. Abr. 151; 1 Vern. 415. And where a copyhold tenement was burnt down, and money was raised by briefs to rebuild, it was held that the money should go to the heir, to be so applied, although the executor should have any interest which might have accrued in respect thereof. 1 Ves. 460.

But where a lease for lives was limited to A. and his heirs, and he afterwards granted his whole estate, reserving rent to his executors, with a power of re-entry to him and his heirs, it was held that such rent was payable to the executor, on receipt of the express reservation; and that if the heir had re-entered, he would only have been a trustee for the executor of the rent. 1 P. Wms. 555. So while the heir has a right of entry to satisfy his rent, after entry it still continues only a chattel interest. 11 Vin. Abr. 147; 1 Lev. 171; Ld. Raym. 135. 158; 1 Sid. 223. 262. 344. And if the grantee of a rent in fee take a lease of the land, now shall his executor have the interest in the lease. Litt. R. 59.

A term of years to attend the inheritance, for whatever purpose created, shall go to the heir, and not the executor; and so the beneficial interest which may accrue in the term after the particular purpose has been satisfied, as payment of debts, annuities, &c. So an annuity, although of a chattel nature, is descendible to the heir. Dr. and Stud. 90. So a crown-grant, out of a particular revenue (2 Ves. 170), even though there is a condition for a gross sum in lieu to be laid out in land; and it would not be considered as money granted to be so laid out, by reason of the uncertainty of such redemption. 1 P. Wms. 204. 206; 11 Vin. Abr. 146. 153. 168. 170; 2 Vern. 139. 645; 2 Ventr. 359; 2 Ca. Ch.

recognizances; or in things issuing out of houses or lands, as rents, commons, estovers, or such like. But where an inheritor reserves rent upon a lease for years, this shall not go to the executor, but to the heir, with the reversion, other than arrearages of it behind at the death of the testator⁽¹⁾. Also commons, corodies for years,

Rent reserved goes with the reversion, save the arrears.

158. 160; Co. Litt. 374, b.; 1 Bro. Ch. R. 223. 377; 2 Ves. 170; 2 Wils. 329; 4 T. R. 229.

But an annuity granted in discharge of debts, is personal estate in the executor of the grantee. 1 Ves. 402; Com. Dig. Biens. C. So the devise of a rent. 11 Vin. Abr. 145. 155; Cro. El. 637. 651; Moore, 549; Dy. 5, b. n. 1; 3 P. Wms. 29. Or where, without naming the heir, the rent would belong to the executor, as on a lease carved out of a term, the reserving it to the lessor and his heirs shall not deprive the executor thereof. 1 Vent. 161. So the grant of a mere chattel interest to A. and his heirs, it shall vest in his personal representative. Ch. Pr. 480. So a bond in compensation from one parcener to another, for severalty of partition, is a mere contract, and shall go to the executor. 1 Vern. 133.—(E.)

(1) And that although they are expressly named in the covenant. 3 Bac. Abr. 62, 63; Harg. Co. Litt. 47, n. 9; Cro. Car. 207. And if the rent be reserved to the lessor and his assigns, the rent is determined, for the heir not being named, cannot have it; but if it be reserved during the term, or the intention of the parties is clear that the rent was to be paid during the continuance of the demise, it will be sufficient to entitle him to it. 2 Roll. Abr. 450; 1 Vent. 148. 161; Hey. 96; 12 Co. Rep. 36, and Harg. Co. Litt. 47, n. 8; 2 Saund. 36; Ld. Raym. 213; 2 Lev. 13.

A rent granted to A. and his heirs for lives, shall go to the heir, because he is specially named (Cro. Jac. 282); and if a penalty is incident to the rent, it shall also descend to him. Harg. Co. Litt. 16. 162, b.

If held of the
king, the whole
is forfeit.

Tem. E. 1.
Assize 124.
Fitz. 3 Bac.
Abr. 61.
11 Vin. Abr.
175.

be void ; and what then it is we shall after show. And the title accrued to the Crown upon attainder of felony, where the party held not of the King, viz. the *annum diem et vastum*, that is, power not only to take the profits for a year, but to waste and demolish houses, and to extirpate and eradicate trees and woods, is but a chattel : and therefore though granted to one and his heirs, by the King, yet shall go to the executor, and not to the heir.

their time, yet the writ shall be in the *detinet* only : but when an executor or administrator taketh the profits nothing shall be assets, but the profits above the rent reserved ; and therefore in such case the writ shall be for rent in the *detinere* and *detinet*. . 5 Rep. 31, *Hargrave's Case*.

One makes *A.* and *B.* his executors, and wills that *A.* and *B.* shall have and hold the issues and profits of his lands until his heir shall attain his age of twenty-one years, to the intent that the executors with the profits of this shall pay his debts, and for the education of his children ; adjudged, that it was an interest in the executors : had it been only that he should have the oversight and doing of all his lands and moveable goods, then it had been otherwise ; as in *Yelp* p. 73, *Carpenter v. Collins*. So in *Dyer*, fo. 26, pl. 17, the disposing, setting, letting and ordering of his lands for the government and ordering of his children. It is no interest to sell the land. *Cro. El.* 678, *Piggot and Garnish* ; *Calth* 26, *Courthope v. Hayman*.

If a man devise lands to his executors to be sold, and his meaning be, that they should take the profits in the mean time, then it is necessary that he deviseth that the mean profits till the sale should be assets in their hands, for otherwise they shall not be so ; and it is better to give them an authority than an estate, unless in some cases. *Co. Litt* 236.—(C.)

*Some doubtful or less clear Cases, touching Chattels
Real.*

FIRST, where we speak of wardship, it is not to be understood of wardship by reason of socage tenure, for that goeth not to the executor, but he shall be next guardian who now, after the death of the first guardian, shall be next of kin, if the ward continue under fourteen years old; else he is out of wardship (*a*). Secondly, if one have a lease for three lives to him and his assigns, this is no chattel, nor shall go to the executor, nor to the heir, but to him who first enters and claims it as an occupant, if no assignment be in the life of the lessee made: contrarily of a lease for many years, if three, or more, or less, so long live, this is a chattel, and shall go to the executor (*b*). So an

37 Ass. p. 11.
Such estate,
pur auter vie, is
now devisable
by statute.
Extent goes to
the executor.

(*a*) If guardian in socage make his executors and die, the heir being within the age of fourteen, the executor shall not have the wardship, but another, the next friend, to whom the inheritance cannot descend. 1 Inst. 90, a. For the guardian in socage had the wardship to the use of the heir, otherwise of guardian in chivalry, whose executors shall have it, for he had it to his own use.—(C.)

(*b*) Assumpsit lieth for executors for a copyhold fine set by the testator. Lev. 3 p. 261, *Shettleworth v. Garnet*; 1 W. & M. in C. B.

3 Mod. 239.
Show. 35.
1 Danv. 28, pl.
13.

Where a covenant to the testator was the cause of making the lease to the executors, for that cause the term was assets in the executors hands. 1 Rep. 98, *Shelley's Case*.

2 Lev. 245.
2 Jo. 126.
2 Mod. 260.
2 Lev. 174.
1 Vent. 298.

Uses and confidences to some respects were reputed chattels, and so were devisable; and to other respects they were esteemed as hereditaments, of which there should be a

extent upon a statute, yet it is delivered to the party as a freehold, viz. *ut liberum tenementum*; but

possessio fratris. But yet in law, neither chattels nor hereditaments; for they were not assets to executors, or assets to the heir. 1 Rep. 121, *Chudleigh's Case*; 8 Rep. 95, *Manning's Case*.

When an executor or administrator taketh profits, nothing shall be assets but the clear profits. 5 Rep. 31, *Hargrave's Case*.

If a man devise that his executors may sell his land, here they have but a power or bare authority, and they must all join; and if one die, or refuse, the other cannot sell; but if a man devise lands to one for life, and after his decease, that his land shall be sold by his executors, there it is otherwise, because they could not sell the land sooner; but there, if the executors were particularly named, then the survivors could not sell. But if a man devise his lands to his executors to be sold, there, as they have an interest or estate which doth survive, their power shall likewise survive, and the survivors may sell. 1 Inst. 112, 113.

At law, if one had refused to sell, the others could not sell; but now by 21 H. 8, c. 4, though part of those to whom such power is devised refuse, the rest may sell; and so may such of those to whom land is devised to be sold, who are willing though the others refuse, by a favourable construction of that statute. Hawk. Abr. 170.

If a man devise that his executors shall sell his land, there the land shall descend to the heir, and he shall take the profits in the mean time; but if a man deviseth his tenements to be sold by his executors, or his tenements to his executors to be sold, there the descent is taken from the heir, and the executors shall have the mean profits till sale, which shall not be assets in their hands; but therefore they are compellable to sell the lands so soon as possible. And when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold; and in such case the executor is bound

that only makes it to be *quasi liberum tenementum* as to the maintaining of an assise, if wrongfully

to sell so soon as he can; for that the mean profits taken before the sale shall not be assets, and therefore he may otherwise take advantage of his own laches. 1 Inst. 236. 383.

If executor do not sell, but refuse to make sale, he is bound to put all the profits of the land to the use of the dead. 1 Inst. 236, a.

If a copyholder surrenders his copyhold lands to the use of his will, and afterwards by his will, duly executed, doth order and direct that two persons, or the survivor of them, or the executors or administrators of such survivor, shall make sale of such copyhold lands, and apply and dispose of the moneys arising thereby, for the intents and purposes in his said will mentioned; they may sell the copyhold lands without being admitted tenants thereof; and the lord shall admit the vendee, and shall have but one fine. *Holder, on the demise of Sulyard, v. Preston*; C. B. 2 Wilson, 400.

The law always gives mortgage money to the executor where no person is named; and where the election to pay money either to the heir or executor is gone by the forfeiture in law, it is all one in equity as if either heir or executor were named; and then equity ought to follow the law, and give it to the executors: for in natural justice and equity, the principal right of the mortgagee is to the money. Ca. in Ch. 85. And the money was originally parted with from the personal estate. 1 Ch. Ca. 283; 2 Ch. Ca. 50. 220; 2 Vent. 348. 351; 1 Ch. Rep. 242; 2 Ch. Rep. Co. Lit. 210. 155. 1 Ch. Ca. 88; Hard. 467; 1 Vern. 170. 412.

A lease renewed by an executor shall be liable to a legacy of the testator's. Ca. in Ch. 191, *Holt v. Holt*.

The overplus of the profits of a term devised out of an inheritance in trust to pay debts to executor, who is also residuary legatee, belongs to the executor, and not to the heir, it being a term, and passeth as an interest. Ca. in Ch. 98, *Gore v. Blake*.—(C.)

4 E. 3. Ass. 166.
Bro. Chat. 15.

put out. Where one is seised in the right of his wife of land, or other hereditament, and is attainted of treason or felony, the profit thereof accruing unto the Crown is but a chattel; and though the King grant it to one and his heirs, yet it shall go to his executors. And if one having a lease for many years, viz. 100, 500, or more or less, doth devise and bequeath the same to *A.* and the heirs males of his body, and for want of such issue to *B.* and the heirs males of his body, and dieth, having issue a son; the term shall not go to his son, but to his executor or administrator; for it cannot be made a matter of inheritance. So if *A.* had died without issue male, the term should not have gone or remained to *B.* but to the executor or administrator of *A.*, as was lately adjudged in the Exchequer between *Sir Robert Lewknor* and *Mrs. Hammond*: So if an advowson, or any other hereditament, granted or devised to one and his heirs for 100 years; or if such a term or grant a rent out of the land to *A.* and his heirs, or the heirs or heirs males of his body; yet shall the same go to the executor, and not to any heir; for it being derived out of a chattel, cannot be any freehold or inheritance, but is itself a mere chattel. *Partus sequitur ventrem*(a).

(a) A man possessed of a term for years, by his last will devised the same to one and the heirs of his body begotten and made his executors and dies: the devise entereth by the assent of the executors, hath issue, and aliens the term

Of Chattels Personal.

PERSONAL chattels; or goods moveable, are also in like manner to be divided into quick or dead(a).

and dieth; this alienation barreth the issue, for a term of years cannot be entailed. 4 Inst. 87.

A term granted to use of a feme-sole, her executors, and not her husband, shall have the use. 4 Inst. 86, 86, 87.

If a lease be devised to one and his heirs male of his body, yet his executors shall have it. For a term is but a chattel, which cannot be entailed; and such devisee may well alien the term to whom he pleaseth. 10 Rep. 87, *Leonard Lovie's Case*.

Where the testator doth bequeath one half of his goods to one person, and makes another his executor, willing and appointing that all his goods shall be divided betwixt them; in this case the legatary shall have half before debts paid, and the executor the remainder after debts paid: as where the executor hath goods to the value of one hundred pounds, and oweth twenty pounds out of the same; here the legatary shall have fifty pounds, and the executor shall pay the twenty pounds debt out of his half. Cowel's Inst. p. 146; 39 E. 3. 37. So Manwood, if granted for life, it is but a chattel. Flow. Com. 524—(C).

(a) If the testator bequeath to A. B. all his goods; in this case it is the opinion of some, that A. B. shall have the testator's whole estate, actively and passively (only his lands, tenements, and freehold excepted), being in effect his executor or heir, as the civil law terms him, and is hereby chargeable with the testator's debts so far as the goods will extend. P. Swinb. p. 7, s. 10.

But others are of opinion, that if a man grant *omnia bona*, that is, all his goods, in this case leases for years, nor a ward, nor things in action, as debts upon promise or obligation, shall not pass thereby, for these are chattels. Kitch.

But if the testator doth bequeath to A. B. all his chattels,

3 Bac. Abr. 57.

No Na. Br.
88. Reg. orig.
f. 102.There it is mentioned, that the prisoner was to pay 159*l.* for his ransom.
Bro. Abr. c. 295,
& tit. Property 38.1 H. 6, c. 5.
Apprentice.

the person of a man taken in execution for debt. And this I hold to be in nature not a real, but a personal chattel (as before was touched), for that debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like law of a prisoner taken in the wars; for thereof and therein, as in a chattel, hath the party a legal interest: as appears in a writ of trespass in the register for taking away a prisoner, *viz. quare quendam Scotum prisonarium suum cepit*, &c. And note lately, *viz.* in the time of King Henry the Eighth, the king himself, upon the winning of Boulogne, bought divers prisoners of his subjects⁽¹⁾. And by a statute in the beginning of Henry the Sixth, his time, this interest in a prisoner is mentioned as valuable, and coming from one king unto another; therefore, doubtless, shall go from testator to executor by death, and not to be infranchised or freed thereby. The interest which one hath in an apprentice I take to be rather personal than real, though for years, because not springing out of any real root,

legatary, though they were brought thither by the testator after the making of his will. *Ib.* 11.

If the testator bequeath to *A.* his herd of cattle, and there is but one left at the time of his decease, the legatary can recover no more. *Ib.*—(C.)

(1) Hence is to be derived the personal interest in Negro slaves, which vests in the executor. *Ld. Raym.* 147; *Carth.* 396.—(E.)

as wardship and villainage do, but out of a mere contract (1). As for a servant whose master is dead, doubtless he is legally discharged, and is not servant either to heir or executor: but meet and honest it is that one of them continue him in service, till a fit time of providing for him a new master; and fit for him, not to depart suddenly. Servant.

Now for things personal without life, these are evident, viz. all household stuff, implements and utensils, money, plate, jewels (2), corn, pulse;

(1) It being in truth a covenant on the part of the master, his executor is bound by it, though not named (Cro. Eliz. 538), and the indentures, as founded on a mere personal trust, are not strictly assignable in law. But if assigned, it is only voidable, and shall not defeat a settlement gained by service under such assignment. 1 Ld. Raym. 683; 1 Bott. 586, pi. 815. So the Court of Chancery will relieve where a considerable premium has been paid. Ch. Ca. 396. And in London, by custom, the executor is bound to place the apprentice with another master of the same trade. 1 Salk. 66, and vid. Stra. 1115. 1266; Doug. 70; 2 Ves. 35.

In case of parish-apprentices, the assignment is regulated by 32 Geo. 3, c. 57; and in all cases a continuance to serve with the executor, in the same trade, is a continuation of the apprenticeship. Stat. 5 Eliz. c. 4.—(E.)

(2) But ancient jewels, which are heir-looms, are excepted. 11 Vin. Abr. 167; Co. Litt. 18, b.; Ow. 124. So ancient portraits, in the family mansion, tombs, escutcheons, pews, &c. descend as appurtenant to the house (12 Co. 105); and so other articles, by the special custom of the place; and, *e converso*, some which savour of the freehold, shall go to the executor, as in Hampshire, granaries erected on pillars. 11 Vin. Abr. 154.—(E.)

hay, wood felled and severed from the ground wares, merchandize, carts, ploughs, coaches, saddles, and such like moveable things (1).

(1) Under the personal estate is also comprised literary property, by the several statutes 8 Ann. c. 10; 8 Geo. 2 c. 13; 7 Geo. 3, c. 38; 15 Geo. 3, c. 53; 17 Geo. 3, c. 57 and 54 Geo. 3, c. 156. So the interest in patents. 21 Jac. 1. c. 3. So personal privileges which are beneficial, as a carrouse in London. 11 Vin. Abr. 151; 2 Vern. 83.

In all cases the property must be absolute, and continuing in the testator, and not held by him as a mere trustee, as if a bond for another's benefit, or where he hath parted with his right, or engaged not to recall it. 3 Bac. Abr. 58; Salk. 69. So of goods delivered to him for a particular purpose, or pledged or distrained; or if, at the time of his death, he be outlawed. 3 Bac. Abr. 58; Shep. Touch. 496, 498.

So of chattels of which he is only joint-tenant, his interest survives to his co-tenant; but in cases of partnership property, stock, or a farm, there shall be no survivorship, but the interest of the deceased is assets vesting in his executor. Litt. s. 281. 321; Co. Litt. 46, b. 182, n. 1 and 4; 1 Vern. 217. 482; Cro. Eliz. 33; 2 Brownl. 99; Noy. 55; 1 Eq. Cas. Abr. 292; 3 P. Wms. 161; Carth. 170. In cases of partners, however, the executor cannot join in the action with the survivor, though the latter is bound to account to him. Salk. 444; Show. 188. In the case of corporations, the rule is, that a grant of chattels, terms of years, bonds made to a corporation aggregate, go to the successors; but where to a corporation sole, his executors shall have it, even though the grant be made to him and his successors. Co. Litt. 9, a. n. 1; 1 Roll. Abr. 515; 11 Co. 65; Dy. 4. 8, a. But by custom, a corporation sole may take in succession, as in London (Cro. El. 464. 682); and where a penalty or arrear is due in his lifetime, for the benefit of the corporation, of which he is the head, they shall go to his successor, and not to his executor. 1 Roll. Abr. 515.

More doubtful Cases touching Things Personal.

FIRST, touching things living, if the testator had any tame pigeons, or deer, or conies, or pheasants, or partridges; these, as well as chickens, shall go to the executors: so, though not tame, if they were taken and kept alive in any room, cage, or like receptacle, as pheasants and partridges often be; so fish in a trunk, as also young pigeons, though not tame, being in the dovehouse, not able to fly out; yet their dams, the old ones, shall go the to heir with the dovehouse. And if the testator had any reclaimed hawks, they also as chattels personal shall go to the executor, because they are things commonly vendible. And whereas hounds, greyhounds, and spaniels, be not so commonly bought and sold, nor so anciently have been; yet they are now grown to be a merchandize; and why not? For although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath to my sense, more spirit and vivacity than any other music. Add hereto, that

10 E. 4, 14, 15.
Come of wild
ones.

22 H. 7.
Kelw. Rep. f.
88. 118. Co. l.
11, f. 50.
18 H. 8, 2.
Cro. Eliz. 372.
10 E. 4, 14, 15,
and 18.

So of young
hawks in the
nest, which if
reclaimed, it is
felony to steal.

3 Inst. 98. 109.

So a hunter's
horn, a fal-
coner's lure.

Property in the public funds is also personalty; and the executor or administrator, upon production at the proper office at the Bank, of the probate or letters of administration, is entitled to have the stock transferred into his own name, or his appointee, and that even in cases of a specific bequest of stock. *Bank of England v. Moffatt*; 3 Bro. C. C. 260; Dougl. 524.—(E.)

Hares, deer,
pheasants, par-
tridges, wild
ducks, &c. are
good meat.

there may be some profit and advantage gotten by them both *quoad adeptionem boni*, and *ademptionem mali*, the getting of some food, and the preserving of others, as lambs, conies, fish, poultry, by killing foxes, wild cats, and others, which destroy them. And we know that money is recoverable in damages for taking away such, or a mastiff serving to keep a house; so of ferrets to catch conies, &c.; therefore they are valuable. But it may perhaps be objected, that none of these above are cattle, and therefore not replevisable, consequently no property in them; for when more than one living cattle is distrained, the replevin is to be by the name of *Averia*, signifying cattle. For answer, not to insist that one may have property in divers things whereof no replevin lieth, as corn or hay not in sacks nor carts, money not shut in bag or box, &c. I further say, that even the word *averia* may be applied to these: for so I find it to hens and capons in the book of entries, *viz.* in the writ of *curia claudenda*, where the plaintiff complains of the defendant's not making his mounds, *per quod averia ipsius A. viz.* capons and hens, and other his cattle, came into the plaintiff's house and garden, to his damage, &c. And both Newpor and Newdigate held, that a writ of replevin lieth for such things (1). Though Brudenel was of a

Fol. 142.

Hen. 8, f. 3.

(1) So estrays, taken by a lessee of a manor for life, who dieth before the year and day, shall belong to the executor. 11 Vin. Abr. 145; Moore, 11.—(E.)

contrary opinion, yet he also held an action of trespass maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life; and first to those abroad in the fields. Put the case, that a man dies in July (before harvest I mean) seised for life, or in fee tail, in his own right or his wife's, or estated for years of land in the right of his wife, being sown with corn or any manner of grain, the common saying is, *Quicquid plantatur solo, solo cedit*: yet this shall go to the executor of the husband, and not to the wife or heir, who shall have the land, but hay, growing (1),

(1) So executor of tenant in dower is entitled, and the stat. 20 Hen. 3, c. 2, is only in affirmance of the common law right. Gilb. Ev. 245, and Co. Litt. 55, b.

So tenant *pur autre vie* has the same rights as a tenant for his own life; and the stat. 28 H. 8, c. 11, extends the benefit of emblements to ecclesiastics (1 Roll. Abr. 655); and the stat. 11 Geo. 2, c. 19, s. 15, enables the executors of tenants for life to recover a rateable proportion of rent, due from the last day of payment to the death of the lessor, which no person before could recover, either at law or in equity. 1 Fowl. 384; Amb. 199; 1 P. Wms. 392; 2 *Id.* 502, *sed ibi*; Bumb. 294. And the provisions of this stat. have been extended in equity to cases where leases have been determined by the deaths of tenants in tail. 2 Br. Ch. R. 659; Amb. 198.

Under the term *emblements*, is included every thing which is raised annually, by labour and manurage, and extends therefore to roots planted, as carrots, parsnips, turnips, corn growing, hops, saffron, hemp, clover, artificial grapes, &c.; and therefore all go to the executor. 3 Bac. Abr. 64; 4 Burn Eccl. L. 254, 255; Com. Dig. Biens. G. 1; Harg. Co. Litt. 55, b; 2 Freem. 210; Roll. Abr. 728; Cro. Car. 516. So

viz. grass ready to be cut down, apples, pears, and other fruit upon the trees, shall go to the

So manure, until spread on the ground, belongs to the personalty. 11 Vin. Abr. 175; Styl. 66. But not trees. Co. Litt. 55, b; and Gilb. Ev. 249; Lat. 270; Com. Dig. Blens. G. 1. H. But when they have been severed, or thrown down by tempest, and the tenant be without impeachment of waste, his executor shall have them, if severed in his life-time: otherwise they continue annexed to the freehold. 1 Roll. Rep. 182; Lat. 163. 270; 11 Co. 84. And if they are severed in waste, as if cut down by tenant in dower, or by the courtesy, or after possibility of issue extinct, they shall belong to the reversioner. 4 Co. 63; 11 Id. 83; Al. 81.

A devisee is in general entitled to the same chattels, in respect of the lands devised, as the heir would be, with this addition, that he shall have emblements which the latter, if he has been seen, would not; perhaps upon the ground, that being in by express gift, he shall have every thing connected therewith, from the implied intent of the donor. But the heir, who has the freehold cast upon him without any intention of the ancestor, expressed or implied, shall have nothing but the bare fee, without any chattels incident thereto. Gilb. Ev. 248; Hob. 132; Winch. 51; Harg. Co. Litt. 55, b, n. 2. On the same principle may be founded the rule, that the legatee of all the testator's stock, goods, &c., shall take emblements in preference to the claim of the executor as well as heir. Swinb. 933, p. 7, s. 10; and Holt. MSS. 157. So a grant in a man's life of lands sown, and he dieth before severance, shall vest chattels incident to the freehold, in the grantee. Gilb. Ev. 247. But as he derives his right by force of the donation, if that be spent before a severance, as if it be a gift for life, remainder over, and he die before the corn sown is reaped, it shall go to the remainder-man, and not to his executor, for no property was vested in him by right of industry, but only by force of the grant; so if there be several remainders (Roll. Abr. 727; Gilb. 27, 248; Hob.

wife; as also if they had been upon a man's own land of inheritance, they should go to the heir, though the corn should go the executor. The reason of the difference is, because this latter comes not merely from the soil without the industry and manurance of a man, as the other do: and I take hops, though not sown, if planted, and saffron and hemp, because sown, to pertain as corn to the executor(a). All those yet shall pass

Gilb. Ev. 240,
et seq.
5 Co. 116.
Roll. Ab. 726.

(a) If tenant for life have hops growing, and die a little before the severance of them, in this case the executors or administrators shall have them, and not be in reversion or remainder; for the hops are accounted as emblements, they growing by manurage and industry of the owner, by the making of hills and setting of poles. Cro. Car. 396.—(C.)

132); and if there be tenant for life, who soweth the land, and be disseised and die before severance, his executor, and neither the disseisor nor reversioner have any property in the emblements. 3 Bac. Abr. 64; Gouldsb. 143.

With respect to the apportionment of interests arising from personal chattels, as dividends of public funds, the distinction seems to be, that equity will decree an apportionment thereof to be paid to the executor of such tenant for life, when it is an interest accruing *de die in diem*, as mortgage interest, provision for maintenance, &c. (2 P. Wms. 176; 1 Bl. Rep. 1016); but not where it is an interest payable and due only on fixed days, as the dividends of public stock (2 Br. Ch. R. 99; 2 P. Wms. 21. 501. 503, n. 1; 1 Foulk. 385, 3 Atk. 502; Ambl. 279; 2 Ves. 672); but where the intention of the first grant was for a continuing maintenance, as of wife or children, until apportionment has been decreed. So where money settled on mortgage has been since transferred to Government Securities. 3 Atk.

For he was tenant for life in effect.

The wife also shall have convenient apparel, 33 H. 6, 51.
2 Elia. Dyer.

3 Bac. Abr. 64.
Swinb. 924,
933, p. 7, s. 10.
Com. Dig.
Licus. (H.)

to one to whom the land is sold or conveyed if not excepted, though never so near reaping, selling, or gathering. But what if the wife, the lease for years, as executor to some for husband or other friend, and the husband sowing dies; who then shall have the corn? Certainly the corn shall go to the executor of last husband, at least so much as is more than the year's value of the land, or the making it by addition of other things; for the value is to be assets for payment of debts and legacies. In the case again, that the husband and wife were joint-tenants of the land; then the very corn growing shall survive to her, together with the land; and though the husband sowed it, yet shall it not go to the executor. Being in consideration of things growing on the ground, let us not forget to think of trees sold by *J. S.* seised of inheritance of the land to *J. D.*, who died before felling; this interest is a chattel, which shall go to the executor, and not to the heir of *J. D.*, some colour may be that these, because fixed to the soil and freehold, are real chattels, as an interest in land is, and not personal. So also trees excepted by him who selleth the inheritance of the land. But in both cases I conceive

260. But it seems otherwise if the original direction that the money should be laid out in land, and that profits in the mean time should be applied as the rents appointed. 3 Vin. Abr. 18, pl. 3; Com. Dig. Ch. 4, 1—(E.)

interest to be personal and not real; for that, as it is a property of a chattel in the vendee or vendor with exception, it stands in consideration severed or abstracted from the soil or ground where the trees grew, though the trees be not actually severed by the ax from their mother earth (1). But if the lessor for years or life do except the trees, these continue parcel of the freehold and inheritance. And after corn reaped, and before the tithe set out, the inheritor of the tithe dying, I think the executor, and not the heir, shall have the tithe after set out.

Co. l. 1. 38.

Now let us come to the testator's house, and see in and about it. Some doubt what pertains to the heir, and what to the executor. A question

Of houses, or things about the house.
43 E. 3, 6.

(1) The rule that the executor hath the same interest as his testator, holds equally in chattels real, if the latter, as lessee of a term, had only a special property therein. The executor shall have only the same qualified enjoyment; but if the demise was without impeachment of waste, he acquires an absolute property in the profits which accrue, as timber, provided they be actually severed from the freehold during the term. 4 Co. 62, b. 7. 90, b; 1 Roll. R. 181. So a tenant in tail, without impeachment, gives his executor or purchaser a right by actual severance in his lifetime. 3 Bac. Abr. 64; Hob. 172; 11 Co. 50. But where the inheritance was afterwards purchased by the person entitled to the trees, it was held that they became reunited to the freehold, and descendible with it to the heir. Com. Dig. Biens. H.; 4 Co. 63, b; 11 Co. 50; Ow. 49; 11 Vin. Abr. 168; 12 Mod. 59. But where a lease was of land, excepting the trees, and the grantor afterwards granted the trees to the lessee, it was held that he had an absolute property in them, and that they should belong to his executor. 4 Co. 63, b.—(E.)

hath been of old, and of late, touching copper
 leads, furnaces, fats for dyers or brewers, pales
 rails, glass in windows, tables, dormants, wains
 cots, doors, locks, keys, and such like, to whom
 these should go, whether to the heir or executor
 21 H. 7, 21. And in the latter end of Henry the Seventh, his
 time, an executor taking a furnace which was set
 in the middle of a house, and not fixed to any
 wall, the heir brought an action of trespass against
 him for so doing; and it was adjudged for the
 heir, viz. that this was to go as part of the freehold
 and inheritance to the heir. And long before in
 19 Ed. 3, f. 6. Edward the Third his time, it was debated
 whether it was waste in a lessee to remove or
 take away a furnace, or not: but I find no opinion
 delivered by the judges. But in the late queen's
 time, Justice Walmsley said that the Lord Dyer's
 opinion was, that where the furnace is not fixed
 to the wall, the lessee might within his term take
 it away. Contrarily, if it were fixed to the wall
 for then it strengtheneth the house. And yet
 notwithstanding it might be in the one case so
 removed by the lessee, yet it is not there, as he
 said a chattel personal or moveable, so as it is
 attachable. And there the case being, that a
 clothier being a termor of a house, had fixed
 copper to the wall, with looms and bricks ne-
 cessary for his occupation; a judgment being had
 against him, the sheriff delivered the copper in
 execution as a chattel, and after the lessee took
 it up, and it was taken from him by virtue of the
 execution; whereupon he brought an action of

H. 37 Eliz.
 Austin's case.

trespass; and by all the judges the action was maintainable. And whereas it was found by the jury, that by the custom of Kent the lessee might remove such a copper; Justice Beaumont said, that without any custom a lessee might do so at time during his term. But it is to be noted in the said case, that the furnace was by itself delivered as a moveable chattel, and not as part of the house; for that was not meddled withal, nor at all delivered in extent (as in the case between *Miles* and *Prat*, where both house and copper were delivered upon a statute), the house belike being held upon such a rackrent, as that the party did not desire to have it; for he might have had the whole being a chattel, and so have used the copper during the term. And as touching all other fixed things, the law was taken in the said case in Henry the Seventh his time to be all one as in the case of the furnace, viz. that they should go to the heir; save only that for glass in the windows. Pollard said it was otherwise, viz. that that should go the executors, which none there denied. But since, in the late queen's time, it was otherwise resolved touching glass, that it should not go to the executors, and the like was there said touching wainscots (1), and so also by the Lord Anderson, in the case of *Austin*. And touching posts fixed, for that they be parcel of

And see 3 Bac.
Abr. 63.
Kielw. 88.
Ow. 70. Salk.
368. 1 Atk.
477.

Co. lib. 4, f. 93,
94.

(1) And paintings, when they cannot be removed without defacing the wall, as if they are put up in lieu of wainscots. And as to fixtures, see 3 East R. 3, and the cases there cited.

-(E.)

the freehold, or thereto pertaining, therefore no to the executors (1).

Things in gardens.

Now to come to gardens also: whereas before laid down a difference betwixt thing sowed, or not arising from the earth without manuring, and such as grow of themselves; it will thence be concluded that the roots of carrots, parsnips, turnips, skerrets, and such like, coming and arising from yearly sowing, must go to the executor, and not to the heir; the case being so that the gardener and sower had the inheritance of the garden soil. Now though in most places this can rarely be a question of value, yet about London and some great towns it may, and therefore is not unworthy of a line or two, and therefore rather for that the reason of this case may give light touching right in other cases. And, in my opinion, these (notwithstanding there is a sowing and manurance to generate them and cause the

(1) 3 Bac. Abr. 63; 4 Co. 63; Swinb. p. 6, s. 7; 4 Bur Eccl. L. 256.

But by the modern construction, such things as can be taken away without injury to the freehold, shall generally belong to the executor; and this rule is more intended in favour of trade, where furnaces, mills, steam-engines, &c. have been erected for the purposes of such trade; for otherwise it would greatly discourage improvements (Harg. C. Litt. 53, n. 5; 11 Vin. Abr. 166. 172; 4 Bur Eccl. L. 256. 259; 2 Str. 1141; 2 Freem. 259; 1 Atk. 477; 3 Id. 14—15; 1 P. Wms. 94; Salk. 368; 3 East R. 3); and this relaxation is extended still more favourably in respect of the executor of tenants for life. 3 Atk. 13; Ambl. 198; Law of N. P. 3—(E.)

being) shall go to the heir, and not to the executor. My reason is, for that the thing of profit is the root which is hidden in the ground; I hold it no reason, nor agreeable to law, that the executor should dig and break the soil and ground to search for her intrails: he is to content himself with that which is above ground; as melons of all kinds, and the like, whose fruit is above the ground; but as for artichokes, though the fruit be above the ground, yet I think they have not such yearly setting or manurance as should sever them in interest from the soil, therefore they shall go with it to the heir.

Let us now consider of things, though not fixed to, yet usually kept in houses, *viz.* writings and evidences, whereabout generally no doubt can be, but that they follow the interest of the land: so as if they touch inheritance, they pertain to the heir(1); if but terms of years, goods, chattels or debts, they pertain to the executor(2):

(1) 4 T. R. 229; 1 Vern. 273; Co. Litt. 107; 3 Bac. Abr. 65.—(E.)

(2) And all such he may sell and covert into money, for the purposes of his trust, and in satisfaction of his own debt, even when specifically given by the will. 11 Vin. Abr. 270; 1 Atk. 463; 4 T. R. 625, n.

So he may redeem chattels left in pledge by the testator. 3 Bac. Abr. 58; 2 Fonbl. 404, n. f.

Nor will equity follow assets for the benefit of a creditor unless fraud or collusion be proved with the executor. 2 Vern. 619; 3 Atk. 237; 14 Ves. jun. 353; and 17 *Id.* 152.—(E.)

Question hath been touching boxes and chests wherein the evidences concerning inheritance are (1): and although the better opinion in our books doth pitch upon this difference, that where they are sealed up, they shall pertain to the heir, otherwise, where not sealed: I cannot conceive that difference to be grounded on good reason, but rather think that boxes which have their very

But where the testator evidently intended to invest his personalty in the purchase of real estate, and so alter its nature, or devises it as real, conceiving it to be such, equity will decree, on failure of such estate, that the money shall go as realty, in order to give effect to the intention of testator. 1 Vern. 271; 2 Vern. 581; 2 Burr. 969; Gilb. R. Ch. 2; Ch. Pr. 265. But if the completion of the testator's title was not, or might not be perfected, as by a foreclosure being only *nisi*; or if the testator's intent is derived only from a general devise of *land*, and in other respects it appears that he considered it as personalty, such a construction shall not prevail against the executor. Mosely, 364; and 3 Ves. and B. 45. But where mortgage money has been stipulated or covenanted to be laid out in land, as in marriage articles, it will be bound. 3 P. Wms. 217. And in all cases, if the heir will pay the mortgage money to the executor, he may take advantage of a right to foreclose. 2 Vern. 67.—(E.)

(1) And wherever the ancestor hath recovered damages for the detention of such deeds, or injury to his freehold and dieth before execution, now shall the heir have execution for the deeds or land, but the executor for the damages. 11 Vin. Abr. 145. 169; 1 Roll. Abr. 889; Cro. Car. 227.

Where a banker claimed a lien on articles in a chest in his custody, claimed by the plaintiff as heir-looms, the court ordered an inspection. *Earl of Macclesfield v. Davis*, 3 Ves. and B. 16.—(E.)

creation to be the houses or habitations of deeds, should, as appurtenant to them, go to the heir, whether sealed or not. On the other side, chests made for other uses, viz. the keeping of napery or apparel, shall not, as I conceive, be taken as appurtenant to evidences, because some be in them, for so may other things also be: nor as touching them can sealing be of any effect, but rather locking and not locking must make the difference touching them, if any difference by enclosure(a).

41 Ed. 3, 2.
36 H. 6, 26.
18 Ed. 3, 4.
3 H. 7, 15.

(a) The portion of an orphan in London is of such a nature, that if the husband die, his widow and not his executor shall have it. Ca. in Ch. 182, *Pheasant v. Pheasant*.

By the custom of London a freeman's widow may require a third part of his personal estate, after debts and funerals paid and discharged, and his children may require another third part thereof; and he may by will give away another third part of his estate; and, if he have no children, the widow may require a moiety of his personal estate. But if a freeman die without a will, administration shall be granted to his wife, and he shall claim one third part by the custom, and one third part must be divided among the children, and the other third part between the wife and children; and usually the woman is allowed two thirds thereof. Priv. Lond. 279; see Eq. Ca. Ab. c. 23. The dead man's third part must go, according to the Statute of Distributions, where he dies intestate, viz. two thirds to the children, and the other third to the wife, and the dead man's third not at all under control of the custom. Trin. 1718, *Walsam and Skinner*, 2 Vern. 59. See 11 Geo. 1, c. 18, s. 17; and 2 Wms. 527.

A freeman by his last will cannot prejudice his wife concerning her third part, yet in his lifetime he may give them away. Priv. Lond. 123.

The custom of London is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any other part of his goods; unless the father under his hand, or in his last will, do express and declare, that it was but in part of advancement; and then that child so partly advanced, shall put his part in hotch-pot with the executors and widow, and have a full third part of the whole, accounting that which was formerly given him as part thereof. And this is that in effect which the civilians call *collatio bonorum*. 1 Inst. 176, B. Trin. 1699, *Chace and Bar*; Hill. 1704, *Bright and Smith*.

In the statute 22 Car. 2, c. 10, for settlement of intestate estates, is a proviso for saving the custom of London, &c.; and thereupon it was adjudged in the case of *Percival*, an executrix, v. *Crispe*, that the third part of the goods of a citizen of London, dying intestate, appertaining by the custom to his administrator, is not subject to distribution by the said act of 22 Car. 2. Priv. Lond. 154; and Sir T. Jones's Rep. 204; Stat. 1 Jac. 2.

A citizen of London cannot devise his child's part over to another, in case his child die in his minority. Ca. in Ch. 199, *Pate v. Hatton*.—(C.)

CHAP. VI.

Of Things not actually in the Testator, but accruing to the Executors by or after the Testator's Death.

THESE be of divers sorts: the first and chief whereof are things gotten and acquired by action or suit; secondly, by condition or covenant without suit; thirdly, by remainder.

Of Things in Action.

To speak first of the first, it is clear that debts due to the testator, be it by bond, statute or judgment, or for arrearages of rent, are not assets to charge the executor until receipt of them: and it is clear that the action to recover these doth pertain to the executor, and that the debt and damages recovered shall be assets to charge the executor (1.) So also of actions of detinue 3 Bac. Abr. 59.

(1) And if one had received money due to the testator, after his decease, the executor may bring an action for money had and received in his right. *Smith v. Barrow*, 2 Term R. 476.

So the executor of an assignee of a bail-bond shall recover thereon (*Fortese*, 367); and he may have it assigned to himself. *Id.* 370.

But in no case, where the cause of action accrued before the death of the testator, can he be charged with the same

and of covenant for any thing personal, or any chattel real, lease, wardship, or the like (a). But

(a) The heir shall not have an action of debt upon obligation, but the executors. F. N. B. 266, *an obligation to one and his heirs*.

They may likewise bring an action for arrear of annuity in fee. *Ibid*.

Lessee of a manor for life dieth, his executors shall have debt for arrearages of the rent. F. N. B. 290, *Eng*.

They may have execution upon a statute. F. N. B. 267 *Eng*.

May bring a writ of covenant. F. N. B. 323, 324, *Eng*. *Covenant for a personal thing*.

Debt for rent by the heir upon a lease by the ancestor rendering rent to him, his executors and assigns, during the term; and upon demurrer the question was, if the heir might maintain action of debt upon this lease. And it was argued for the defendant, that the action lieth not by the heir, he not being mentioned in the reservation, but by the death of the lessor the rent determined; for which they cite Owen, 9, *Richmond v. Butler*; Latch, 44. 255. 264, *Sury v Cole*. But *e contra* were cited for the plaintiff, Pasch. 22 Jac. Rot. 62, *Sury v. Cole* and *Hill*; 20 Jac. Rot. 177, *Sury v. Browne*. Both adjudged, that the rent continued, against that which is reported in Rolls and Latch, in these very cases. Hale, chief justice: the rent being reserved to him

as assets, until reduced into possession by judgment and execution (3 Bac. Abr. 60; 11 Vin. Abr. 239; Salk. 207 Shep. Touch. 497); and an account subsequently stated by him does not make the balance found assets, unless actually recovered. But if he release any such debts, he shall be chargeable therewith; for this, in law, amounts to a receipt Hob. 66; Cro. Eliz. 43. When the cause of action accrues after the testator's death, the debt or damages is asset immediately. 1 Salk. 207.—(E.)

perhaps some will doubt of covenant touching inheritance, viz. the assurance of lands, or enjoying thereof free from this or that incumbrance, or the like (a). Yet even in those cases, if the cove-

A clause of the testat. inher. becomes void in his life comes to the exec. as a thing in action; but is not as-

the executors and assigns, shall continue after the death of the lessor, and shall go to the heir by the apparent intent that should endure after the death of the lessor; for otherwise could not go to the executor, and that without the words using the term; otherwise where the rent is reserved to him, or to him and his assigns. And at another day afterwards, after that the case had been twice argued by Jones and Hunt for the plaintiff, and by Bigland and Winnington for the defendant, judgment was given for the plaintiff. *Lev. 13; Sacheverell v. Frogget, 2 Saund. 367.—(C.)*

(a) Resolved, That an eviction being of the testator, he could not have heir or assignee of that land, but the damages could be recovered by the executors, although they are not named in the covenant, for they represent the person of the testator. 2 *Lev. Rep. 26, Lucy v. Levington*; and 1 *Ventr. 347.*

So, the grantee of an annuity dies, his executors shall have action against the grantor for the arrears, because they can have no other remedy; for distrain they cannot, for the title in the rent is determined. 1 *Inst. 146.*

If in a court of record the plaintiff die after interlocutory judgment, and before final judgment, the action shall not abate, if the said action might be originally prosecuted by the executors or administrators. The like of the defendant.

29 W. 3, 11.

In actions upon bond, or penal-sum, for nonperformance of covenants, the plaintiff may assign as many breaches as he thinks fit, and the jury shall assess damages for such as shall prove broken, and the like judgment shall be entered as the same as hath been usual. And if the defendant after execution executed shall pay such damages and costs, a stay of execution shall be entered upon the record;

sets, for not
vendible.
1 Vent. 176.
347.

nant were broken in the testator's life-time, I think clearly the action is accrued to the executor, for that his testator was to recover damages in the action of covenant for that breach; and he being entitled to these damages as principal, and not any accessory thing in that action, the law hath cast that action upon the executor (1). And

or if by execution executed the plaintiff shall be fully satisfied, the damages and costs with reasonable charges, the body, lands, and goods of the defendant shall be discharged, and satisfaction entered upon record: yet the judgment shall stand as a further security to answer the plaintiff, his executors, &c. for further breach of covenants in the same deed or writing contained, upon which the plaintiff, &c. may have *scire facias* upon the said judgment against the defendant, his heir, terre-tenants, executors, &c. upon which shall be like proceedings as before, &c. Stat. 8 & 9 W. 3, 11.

Assumpsit for 100*l.* for wares sold by the plaintiff, and one Witty, whom the plaintiff survived. The defendant pleaded in abatement, that the plaintiff and Witty were joint-merchants, and that by the law-merchant there is not any survivor between them, and that Witty made such a one his executor, who hath administered, and is now living, not party to the suit as he ought. Upon which the plaintiff demurred, and upon consideration of Co. Litt. 172. 182. and F. N. B. 172, E. it was resolved by the whole court, that the bill should abate. Lev. 2 p. 188, *Hall v. Hufham*.

A man may join two or three things in his action against executors, where the conclusion of his action is pertinent to the several matters, and doth not vary; as for goods, and debts against them in the detinet, &c. *Vide Touchstone Precedents.*—(C.)

(1) But where the covenant by the testator is made with several jointly, the executor cannot maintain an action for
breach

that is the cause why, if waste be committed in the life of the lessor by his lessee, and then the lessor dieth, his heir can have no action for this waste; viz. because he cannot recover the treble damage; so neither can the executor have it, for that he cannot recover, *locum vastatum*, the place wasted, the inheritance whereof is in the heir.

That the executor at the common law could not maintain an action of trespass for goods of his testator taken away in his life-time, seems to be implied by the statute in the time of King Edward the Third, which gives such action (a). Yet it seems that a replevin was maintainable by the executor, at least in some cases, for goods taken or distrained in the testator's life-time. But in cases the distress were for rent or service, it is said, a little after making of that statute, that the lord may now avow for his rent or service, because his tenant is dead, but must set forth the matter, and thereupon justify to excuse himself from answering damages; and the executor shall by this action recover the cattle or goods, and

11 H. 4, 22.
45 E. 3, 3.
No. Na. Br. 596.
4 E. 3, c. 7.
4 Ed. 3, c. 7,
gives the action
to executors.
And the like
given to execu-
tors per stat. 25
E. 3, c. 5.
17 E. 3, Fit.
106.
25 Ed. 3, c. 5,
gives such ac-
tion to executors
of executors.
3 Bac. Abr. 59.
Lat. 168.

(a) Executors may bring a writ of trespass for cattle, corn, &c. taken of the testator's. F. N. B. 97. 193. And damages recovered by the executor in an action of trespass shall be taken, yet they were never in the testator. Co. Litt. 124.

(c).

reach, in the testator's life-time; but the action is joint, and goes to the survivor. *Southcote v. Hare*, 3 Taunt. R. 87. But he will be accountable to the executor. Salk, 444; Shaw. 168; Harg. Co. Litt. 182.

C. 21. meant,
ut crede 21
H. 6. 1. But
Markham is
contra.

21 H. 8, c. 19,
4 E. 3.
The B. of Coven.
and L. and
Sale's case, M.
32 & 33 El. in
Com. Ban. So
of ravishment,
de gard.
7 H. 4, 2. & 7
H. 4, 6.
Eject. Firm. &
de clauso fracto
merely, it lieth
not.

that by the common law, saith the book, though the statute of Marlbridge had never been made, for that the propriety remained in the testator. Note, it speaks not at all of the said statute of 4 Edward the Third. But Newton, in the time of King Henry the Sixth, would have it, that the executor in that case should not have a replevin, but an action of trespass grounded upon the said statute, viz. 4 Edward the Third, which methinks cannot be by any means, by reason of the statute of Marlbridge, c. 3. *Non ideo puniatur dominus*, &c. for the executor, as well as his testator, is thereby restrained, as I think, from the action of trespass against the lord (a). As for that no avowry can be made upon the tenant, that is now remedied by a late statute. The other statute hath been taken to extend to other things than goods moveable: for where a church becoming void, a stranger presented thereunto wrongfully, and the patron died, it was resolved, in the late queen's time, that the executor might, by the equity of the said statute, maintain a *quare impedit*. But whether an action of trespass lieth for

(a) By 21 H. 8, c. 19, in replevin the avowry or conusance may be made upon the lands, without naming any certain person to be tenant thereof.

In replevin executor or others need not allege seisin in making avowry for rent; for the deed is the title, and no seisin need be alleged, unless forced by an old statute of limitation. Coke's 8 Rep. *Sir William Foster's Case*, 65. But see Poph. 189; and he may replevy goods taken after the testator's death.—(C).

an executor against him who spoileth the testator's corn, grass, or wood growing, hath been questioned, but nowhere resolved, to my knowledge. I think it may lie with some difference. First, for that the statute of 4 Edward the Third doth not only speak of goods carried away, as limiting the law to that trespass solely and particularly, but speaks generally of trespass done to testators; and then brings in that particular of goods, as one instance. Now there may be many cases of instances or ensamples given in Acts of Parliament, which yet do not restrain the remedy or purview to that particular, or for extending to other cases of like nature⁽¹⁾. Thirdly, the statute speaks of trespasses remaining unpunished, which it meant to redress: but it should still leave many unpunished, if it should have no larger extent than to that one singular trespass of goods taken away, *viz.* moveables. Again, the testator was clearly entitled to a recovery of damages for this other trespass, which if he had recovered, should have come to his executor: yea, the things themselves, all, if felled in the testator's life, and

11 H. 4. 3.
This Periam,
Justice, did very
judiciously urge
in Sale's case,
supra. The
words of the
act are, execu-
tors shall have
an action for a
trespass done to
their testator,
as for his goods
and chattels
carried away in
his life, and
shall recover
their damages,
&c.

1 Ventr. 187.

(1) So, upon a liberal construction of the stat. 2 and 3 Ed. 6, c. 13, he shall have the action of debt for not setting out tithes. 1 Sid. 88. 407; 1 Ventr. 30; Poph. 189.

So, an executor may have an action against a sheriff for an escape in the testator's life-time (Cro. Car. 297); or after his death (Goldb. 262; 1 Roll. R. 276); or for a false return, or other misconduct, whereby the testator is injured. 1 Salk. 12. So, where being landlord, an officer has removed the goods without paying him first a year's rent. Stra. 212.—(E).

part, though not felled, should have come to the executor; therefore all the damages recoverable in lieu thereof, out of which (recovered) the debts and legacies of the testator are to be satisfied. Beside, this action of trespass is a thing severed from the state of the land, so as if the owner thereof had, after this trespass done, aliened the land, yet had not this action remained to him, as I take it clearly. And why not as well as where a trespass is done upon the lands of the lessee, and then the term expires? This doubtless doth not take away his action, nor his executors. But methinks here may be some differences probably taken: as first, between a trespass in destroying or taking away corn growing, and a trespass in grass or wood growing. For the first being of that nature, as that, though the owner had a state of inheritance in the land whereon it groweth and should have died before severance and felling, yet it should have gone to the executor, and not with the land to the heir; therefore doubtless doth the action for destroying or taking away thereof accrue by the operation of the law to the executor, in lieu of the thing taken or destroyed. Otherwise, perhaps, of wood or grass, which the owner's death should have gone to the heir and not to the executor. And yet here again another difference, methinks, may be betwixt grass and grass, viz. betwixt that in pasture as that in meadow, yearly mowed and turned in hay, not left to be consumed by the mouths of beasts, as that growing in pasture: for as the law

linguisheth between these soils, it gives pre-
 edency to meadow, and makes it waste for a
 ones to plough it up, not so for pasture. Yea,
 the is paid of hay, but (a) not of grass growing
 in pastures: so the meadow grass, being in the
 owner's purpose and intention as a thing severed
 from the soil, should, methinks, so be also in the
 eye and estimation of the law, and therefore
 stand in a different state and account from
 pasture grass.

A third difference may be in the manner of the
 trespass, *vis.* where meadow grass is eaten up
 with cattle by a trespasser, and where by him
 mowed and carried away as hay: for in this
 latter case an action of *trover* and *conversion* for
 so many loads of hay is doubtless maintainable
 by the executor; though it should be admitted
 that in the other case, of consumption by the
 mouths of beasts without severance, no action
 should be maintainable by the executor; which
 yet I admit not, but think the contrary probable.

For when meadow ground, which yearly con-
 ceiveth (*Sol sine homine generat herbam*), shall be
 ready to be delivered of her burthen, if a stranger
 put in a herd of cattle, which swallow up and
 tread down this fruit of her womb before the
 mower with his scythe come as a midwife to help
 her delivery, if then by the hasty death of the

At least, me-
 thinks, action
 upon the case
 here and before
 should be main-
 tainable.

(d) Tithe of agistment is payable for depasturing unpro-
 pable cattle upon grass growing in pastures. Bunb. Rep.

a. 2. (C.)

owner, before action brought, this great t should be dispunishable, it were contrary; thinks, to the purpose of the said statute; great defect in the law.

Yet here, perhaps touching this, a difference may be or arise out of the time death of the owner, viz. where he died time of mowing, and where not; for *dato* the former case, because if such destruc consumption had not been, yet the owne before severance, this should not have e the executor, but have gone with the soil heir, that therefore the executor who is not fied should recover no damages. Yet in th case the owner living till after hay-time passed, viz. till the end of August, methin since this fruit of the meadow's womb have been a chattel severed, had not th passer made unlawful prevention; theref execution to whom the same should hav towards the performance of the will, shoul out of the said statute, an action and reached unto him to recover recompe damages for this wrong done *in retard executionis testamenti*.

A fifth and last difference may perpap the state of the owner: for *posito* that wl land is his freehold or copyhold inherita action should be given to his executor f or grass taken or destroyed in his life-tin where he is but tenant for years, guar tenant by extent, so as the very estate in t

was to come, and is to come to the executor (together with *quicquid plantatur solo*), methinks the executor should have, together with the estate in the soil, the action to punish the robber of, or trespasser upon the soil. Thus having scanned and sifted to the best of my ability all differences and circumstances of this point, how far I am wide, and wherein right, *aliorum sit judicium*, or rather, *altioris esto judicii*. But this is clear, that wheresoever executors do recover any damages for trespass or other wrong done to their testator, the money recovered (at least if execution be had, or money received) will be assets in their hands, as well as debts recovered upon bonds, or bills, or lands by them taken in extent upon statutes, recognizances or judgments (a). Yea,

3 H. 6, 3.
Little. f. 84, a.
So held in Sale's
case of damages
in Qua. Imped.
recovered.
Contra of the
presentment
releasing.
13 Ed. 3, tit. 91.

(a) Actions personal, as such actions whereby a man claims debt, or goods, or chattels, or damage for them, or damages for wrong done to his person, and is that which in the civil law is called *actio in personam*, and is brought against him who is bound by covenant or default to grant a thing (1). *Terms del Ley, verb. Action personal.*

In an action upon the case the plaintiff declares, that upon communication of a marriage to be had between the intestate's daughter and the defendant's son, it was agreed, that the intestate should give the son 50*l.* with his daughter, and that if the daughter survived the son, the defendant should

(1) A mere personal action does not ensue to the executor (Lat. 168, 169; 1 And. 243; Jones, 174); as an action for a breach of promise of marriage, unless special damage be shown. 2 Maule & Selw. 408. And *semble*, if the action be founded upon a mere contract, and no damage to the personal estate be shown, the executor cannot maintain the action. 1 M. & S. 355.—(E.)

without ever having these monies, executors may make them assets in their hands, viz. by making releases or acquittances, or acknowledgment of satisfaction; for this amounteth to a receipt, and chargeth the executors towards the creditors with the whole penal sum, though haply they receive but part, as the principal, or some like proportion.

Therefore there is great caution to be used by executors in this kind, that unless they be sure they have goods sufficient to pay all debts and legacies, they make no release, acquittance, or acknowledgment of satisfaction, for more than they receive, be it debt or damages.

And the like caution is to be used by them touching submission of debts or damages to arbitrement, whereby discharges of the same may grow: for the submission to the arbitrament being their voluntary act, although the arbitrators by their judgment do discharge the debt or damages in part, or in whole; yet shall the creditors have like remedy thereupon against the executors as if they had released, or, which is more, received the same (a).

Error 13 H. 4,
6.
46 E. 3.
Yet upon a verdict in Qua. Impedit, the wife not the executor of the husband did scise.
9 H. 6, c. 4.

pay her 100*l.* after his death, and mutual promises were made between the intestate and defendant to perform the agreement; and shows that the marriage was had, and that the intestate paid the 50*l.* and died, and that the son died and assigns breach in the defendant's nonpayment *in retardat administrat.* &c.; and upon *non assumpsit* it was found for the plaintiff. Al. Rep. 1, *Bafield, adm. v. Collard.*—(C.)

(a) *Assumpsit* where differences had been between the plaintiff and defendant (but did not say touching what thing

Other actions there be of discharge, which as the testator himself in his life-time might have had, so may his executor after his death, viz. writ of error, attaint, disceit; *audita querela, identitate nominis*. But this last is given by statute. Whatsoever is regained by any of these ways as unduly lost by the testator, shall also be assets(1).

3 Bac. Abr. 60.

the differences were); they submitted to the award of J. S., who awarded, *de et super premissis*, that the defendant paid to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly. After verdict for the plaintiff judgment was stayed, and after divers motions in that and other terms, entered for the defendant; because it appeared not that the defendant is executor, administrator, or trustee for Woolly, nor that he had any thing of it, or had submitted upon the behalf of himself; and so no consideration to charge him for the estate of Woolly. 2 Lev. 225, *Adams v. Statham*.

Debt upon obligation conditioned to perform an award, and upon demurrer the case was such, the plaintiff as executor, and the defendant, submit all controversies, &c. The arbitrators award, That the defendant should pay to the plaintiff 30*l.* A creditor of the testator attached it in the hands of the defendants, as the debt of the testator: and if it were attachable as the debt of the testator was the question: for it was agreed that it should be assets in the hands of the plaintiff when he recovered it, the submission of the plaintiff being only as executor: and after argument it was agreed, that the sum awarded was not attachable in the hands of the defendant. 1 Lev. 306, *Horsley v. Turges*.—(C.)

See the case of Fisher, administratrix, v. Lane and others 3 Wilson, Trin. 12 Geo. 3.

(1) So he shall avail himself of all equitable rights of his testator in personal property; and where any such be recovered by a decree in a court of equity, it shall be deemed assets. 3 Bac. Abr. 59; Moore, 858; Brownl. 76; 2 Ch. C. 152; Roll. Abr. 920.—(E.)

SPECIAL CASES, PERTINENT TO THE PREMISES—

1. *Chattels come to the Executors from the Testators, yet not Assets.* 2. *Assets which be = Chattels.* 3. *Things in Action, and not in t = Personality, turned into Chattels real, and contra.*

As to the first, I exemplify thus : *A.* makes his executor, and dies ; *B.* makes *C.* his executor and dies : the goods left by *A.* to *B.* as executor far exceed his debts and legacies. Or let us suppose no debts or legacies of *A.* and that *A.* dieth much in debt above the goods he leaveth and did make no alteration of the property of the goods of *A.* but merely left them to *C.* his executor. Now shall not the goods which came to *B.* as executor of *A.* and so from *B.* to *C.* be liable in law to pay the debts of *B.* ; yet in conscience methinks they should, and that *C.* should not receive them to his own use, as in law may, where *A.* left no debts. But if *A.* make *B.* executor, did also by his will give him all the goods, and he in his life-time made election to have them as legatee, or by his will did so dispose of them, or appoint them to go, as the goods he had as executor, they could not be otherwise given or disposed. Now by this election, they were altered in property from being his as executor, and so as his own goods should be liable to his debts. But things in action could not

so given or disposed, viz. debts, &c. Yet if *D.* were indebted to *A.* one hundred pounds, and *A.* his executor took a new bond of him, or another for it, giving up the old bond; now was it become his own debt, and so shall stand in his executor.

Another instance of this, thus: if *A.*, patron of the church of *D.*, grant to *B.* the next avoidance, the church becomes void, *A.* dies before he presents, his executor presents, and hath the benefit of preferring his son or friend: yet shall this make no assets in his hands for payment of debts, for that he could not lawfully take money to present^(a). But if *B.* had died before the church had become void, then, because the executor might lawfully have sold it, the value should be assets in his hands, as I conceive; except perhaps the incumbent had died so hastily after *B.* that the executor had not time convenient to find out a chapman and to sell it.

If, in the other case, a stranger had presented, and got his clerk admitted, and the executors of *B.* had in a *qua imp.* recovered damages, the money so recovered should have been assets. Thus much of the first, viz. that some things of the nature of chattels may come to executors, and yet not be assets^(b).

Or if a stranger usurp in his life, and he dying, his executor recovers in a *Qua. Imped. in Com. Ban.* as by Sale was done *infra*, Mich. 32 & 33 Eliz. So held in Sale's case, *Vendere jura potest, emeret ipse prius.*

Shep. Touch. 496.

11 Vin. Abr. 173.

(a) Where executors of a bishop shall have a ward which fell in the life of the bishop, otherwise of a presentation to a church which voided in his life. 1 Inst. 388.—(C.)

(b) In *Can.* it was said by Fountaine, serjeant, to have been resolved in that court, and then admitted by the Master

22 H. 8, Br.
Villainage, 46.
If he die, how
shall this be as-
sets in the heir.

Touching the second, viz. that some things may be assets in the hands of executors which

of the Rolls, alone in court, to be reasonable, that if a man devise lands for payment of his debts, and make an executor and leave a personal estate, that no part of the personal estate shall go to the payment of the debts; because by the making of an executor the testator's intent appears, that the executor should have the goods, because the testator hath made an other provision for the payment of his debts; but if a man dispose of lands for the payment of his debts, and afterwards dieth intestate, the personal estate shall be chargeable in the hands of the administrator to the payment of his debts; for thereby more lands shall remain unsold for the benefit of the heir, or more of the money by the sale of the land shall remain to the heir, and no intent appeareth that the administrator should have any thing. *Lev. 1 p. 203; Faith v. Ex. of Harlston.*

A. seised of land in fee, levies a fine of it to the use of himself for life, remainder to his executors till they have levied 300*l.* out of the profits. A. dies, his executors and a stranger to hold the land, and to receive above 300*l.* of the profits, and after the executors of A. enter and hold the land for years. This lease is void, for the executor's estate was determined by their negligence, and the words of the deed declaring the uses of the fine) "till they have levied 300*l.*" shall be expounded as if the words were, "Till they might have conveniently levied the same. *Moore, 721.*"

A man devised lands to be sold by his executors, the money raised thereby to be disposed in legacies particularly expressed in his will, and one of the legataries after the probate of the testament sued in court Christian for the legacy. The prohibition did lie in this case was the question; and as seemed to the judges it did not lie, for that the money was assets in the hands of the executors, and no remedy for the legacy in the temporal court. *Dyer, 264, Pl. 41.*

If a man hath a bare authority accompanied with a trust as executors have to sell lands, they cannot sell by attorney.

yet are no chattels, I shall give but two instances. First, where a man leaveth a villain for years to

but if a man hath absolute authority as owner of the land, as *custos que. use* heretofore had, then it is otherwise. *Viob. 9 Rep. 75, Combe's Case.*

Debt in the detinet, and declared upon a judgment, had for himself against the defendant as administrator of Lane for 27*l.* damages in assumpsit, and 8*l.* costs, and showed not how, if the damages, or if costs were *de bonis suis propriis*, but generally *quod cum recuperasset* 27*l.* for damages, and 8*l.* for costs. Upon which the defendant demurred generally, and pretended the declaration was insufficient; for if it was *de bonis suis propriis*, as it might be for the damage upon *ne adm. administrator ou executor*, then it ought to be in the debt; or if the costs are *de bonis propriis*, as they ought to be, if he had not assets for them, it ought to be in the debt; but at the day the defendant came not to maintain his demurrer, upon which judgment was given for the plaintiff. 2 Cro. 545, 546. It is good in the detinet, because it shall in assets when it is recovered, be it the one or the other. *1st. 1, p. 231, Wheatley v. Lane*; and 1 Saund. 216.

Debt in the debt and detinet, upon a judgment against an executor, and count that he had wasted divers goods to the value of the debt, and showed not the certainty of the goods wasted, the defendant demurred upon the declaration; and it was argued, that this action did not lie in the debt and detinet; for if so, it should charge an executor of an executor which may not be, because it is no other than a personal wrong. 9 H. 6, 9; 3 Cro. 530; 11 H. 4, 56, were cited as authorities for the defendant; to which it was answered, that it is more than a personal tort; he is charged here for having of the goods, and converting them to his own use. The executors of a sheriff shall not be charged for an escape; but if the sheriff levy the money, and detain it, his executors shall be charged for it. 3 Cro. 539, *Parkinson v. Gillert*. And to the case 11 H. 4, there is not any devastation laid, but to maintain this action were cited 11 H. 6, 7, 8, 16,

his executors, and the villain purchaseth land in fee-simple, and the executor entereth into the

17, 18, where upon a *devastavit* the executor is chargeable in the debet and detinet by *Strange, Paston, and Babington*, and in divers other cases; and of such opinion were all the court here, and did give judgment for the plaintiff. Lev. 1, p. 255, *Wheatly v. Lane*.

Skelton brought debt upon a bond against *Elizabeth Maddox*, an administratrix, who suffered judgment to go against her by default; she makes her will and the defendant *Hawling* executor thereof, and dies; and this action upon the judgment is brought against *Hawling* suggesting a *devastavit*, *Hawling* pleads that he has fully administered the goods and effects of *Elizabeth Maddox*; and to prove a *devastavit* the judgment by default was given in evidence at the trial; and whether a judgment by default against the defendant's testatrix, who was an administratrix, is an evidence of a *devastavit*, was reserved for the opinion of the court. After argument and time taken to consider, the Court gave judgment, that if an executor or administrator suffers judgment to go by default or confession, and an action be brought against him on the judgment suggesting a *devastavit*, he cannot plead *plene et administravit*, for by the confession of the judgment, or letting it go by default, he has admitted assets to the amount of the demand: and it is the same if the action on the judgment be against the executor or administrator of an executor or administrator; so judgment was given for the plaintiff. *Skelton v. Hawling*, ex. &c. 1 Wilson, 258.

Debt against two as executors, they plead a judgment obtained against one of them as administrator; the plaintiff demurred and objected, first, because the action and judgment is against him as administrator; which he might have avoided by plea in abatement, that he was executor. Secondly, because it was only against one, which lieth not without the others; to which it was answered, and resolved, that the judgment was well pleadable in bar; and to the first was cited Cro. 646, adjudged in point, and the case of

and; now hath he fee-simple therein, and this and is assets for payment of the testator's debts.

So if a man by his will give lands in fee to his executors, to be sold for performance of his will; these (before the money thereby raised) are assets both for payment of debts and of legacies (1). But if the lands had been given to be sold only for payment of debts, they should only be assets for that purpose, and not for payment of legacies: and so if it were expressed to be for payment of legacies singularly, this should not be assets for

3 H. 3, 63; and
so 2 H. 4, 21.
If by feoffment,
per Markham,
Cap. Just. con.
Rickhall.

Wheatley and *Lane* in this court before; and to the second, 3 Cro. 437. And although that the action was not well brought, the defendant was not obliged to plead in abatement, and put himself to greater charge after that there was a true debt, and a recovery had upon the right of the debt. Lev. 1 p. 261. *Parker v. Amis, &c.*

Debt against defendant as administrator of F., he pleads a recovery against him as executor; and besides to satisfy that he has not any assets; and upon demurrer thereto, it was adjudged a good plea, and he shall not be twice charged; therefore it was adjudged for the defendant. *Smalpeace v. Smalpeace*, Mich. 40 El.; Cro. El. p. 646.—(C.)

(1) Whether estates *pur autre vie*, not being devised for payment of debts, shall be assets or not, depends upon there being no special occupant; if there be, it is by the Statute of Frauds made real assets by descent, and chargeable in the hands of the heir, as in case of lands in fee-simple. 3 Atk. 66; 18 Ves. 273; 2 Fonbl. 896, n. R.; 4 T. R. 229. As to the distribution of the surplus, if any, see 14 Geo. 3, c. 20.—(E.)

See 9 Eliz.
Dyer, 234.

Construction of
general words
in a statute,
secundum sub-
jectam ma-
teriam.

debts, as I take it (a). For since these are assets of their own nature, but so made by will and disposition of the testator, notwithstanding they cannot be otherwise nor farther assets than the testator hath willed and disposed. But the lands thus given were assets before the statute

(a) Ejectment, and upon trial before Charlton, justice, the poverty of the parties, and to prevent the charge of a special verdict, the case was put to have the opinion of the court, and it was such:—A man seised of lands on the death of the mother devised them to his executors for payment of his debts for sixteen years, and after to one who was his heir on the mother's side; and if he should take them by descent or purchase by the will was the question: and Ch. before that the case was put, inclined that he should take by purchase, being the better for him; for then the heir on the part of the father might come to inherit by him before the heir on the part of the mother, and so both heirs inherit, and so it was argued at the bar by the counsel on that; but on the other part it was argued, and so resolved by three justices, Pemberton, Windham, and Levins, that the devise was void, and he should take by descent; and it was more than if the deviser had made a lease for sixteen years and then devised the reversion to his heir; and the debt was from him to the heir on the part of the father or mother, but a consequent depending upon the nature of the devise. And it is not like to the case where a man having daughters devised the lands to them and their heirs; for the quality of the estate is altered in themselves, and they thereby joint-tenants, and survivor shall be between them which had not been if the lands had descended to the coparceners. And judgment was given according to the opinion of the three judges. 3 Lev. 127, *Hedger v. R. Trin.* 35 Car. 2, in C.B.; 1 Sal. 241; 2 Mod. 286; 2 Lev. 79; Plow. 545; Ow. 125. 148; Mo. 593. 666; Cro. Car. 1 Cro. El. 313. 840; 1 Co. 105.—(C.)

21 Henry 8; c. 5; yet how can it be so, since the very words of the statute be, that if one do will by his testament or last will any lands, &c. to be sold, neither the money thereof coming nor the profits taken shall be accounted as any of the goods or chattels of the testator's; which I conceive to be all one as to say, that they should not be assets. For when an executor denieth himself to have assets, the form of his plea is, *quod nulla habet bona nec catalla*, &c. Yet since that statute, viz. in the late queen's time, the law was twice admitted or conceived still to be according to the third of Henry 6, viz. that the land devised to be sold, or the money thereof coming, should be assets. Indeed in neither of those books is there any mention of the clause in the said statute; and it is possible that it might be forgotten, as in other cases sometimes hath happened. But treading about how to reconcile those books with the said statute, and not to suppose the same forgotten at both times, both at the bar and bench (though being but a short clause in the middle of a large statute to other purpose, it might well so have been), at the last, though not hastily, I grew to conceive, that the said clause being in an act which limiteth the fees of ordinaries, and their scribes, according to the value of the goods of the deceased, and then bringeth in this clause, that the lands willed to be sold shall not be accounted as any of the goods, &c. the parliament meant thereby only to exclude them to this purpose, that they should not be accounted as part of the

9 H. 6, 264.
14 H. 6, 36.

goods in the valuation, according to which the said fees were to be rated : and though the words be general, that they shall not be accounted as any of the goods, &c. yet it is the more probable that the parliament intended no farther than as aforesaid, because that clause, after the fees limited in answerableness to the values, is brought in by a proviso, *viz.* Provided always, that if the deceased willed any lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late queen's time ; though no mention be of any remembrance of that clause or provision, in either of those cases reported by the Lord Dyer.

As for the third, *viz.* the changing of things out of the personalty into the realty, and *e contra*, I show it thus : if a debt were due to the executor as executor, by statute, recognizance, or judgment, and he sue execution, and have land of the debtor's in extent ; now is the personal duty turned into a chattel real. On the other side, if such an estate by extent, or a lease for years mortgaged, come to an executor, and the debtor or mortgagor payeth the money due ; now are these real chattels turned into assets personal (a).

(a) Terms in gross are personal assets. 11 Vin. Abr. 233, 240 ; 2 Brownl. 47. So, when determinable on lives (*supra*, 54) ; but not when they are invested in trustees to attend the inheritance. 2 Fonbl. 114, n. R. ; 1 T. R. 766. — (E)

Another special Case of Equity opposing Law.

IF *A.* be bound to *B.* by bond, statute, or recognizance, for assurance of land, *B.* dieth, and the land descends to his heir; or be it that *B.* sold the land to *C.* and assigned to him the bond, statute, &c.; yet must the suit or taking out the extent be in the name of the executor of *B.*, and neither of the heir or assignee. And that which is recovered or gotten in extent will be assets in law to charge the executor, as I take it; yet in equity it pertains to the heir or assignee. *Quere*, if the executor meddle not, but only suffer his name to be used.

Suppose the condition broke in testator's life, Qu. to whom it pertains in that case.

Of Things come to Executors by Condition.

FIRST, we will consider of conditions bringing back to executors goods or chattels granted away by their testators. Touching which there is no doubt, but if the condition be any other than for payment of money, or other things valuable by the testator or his executor, the chattels returning to the executor are assets in his hands: as put the case, of a lease for years; horses, sheep, plate, or other chattel, were granted by the testator to *A.* upon condition that if *A.* did not pay such a sum of money, or do other act as the testator appointeth, &c. and this condition is not performed after the testator's death; now is the chattel come back to the executor, and is assets.

21 H. 7.

But the question hath been (and perhaps be), where the condition is, that the testator's executors shall pay the money to make the grant, and accordingly the executor after the testator's death payeth the sum out of his purse, not having any money of the testator in his hands; in this case coming in question *per* Henry 7, it was resolved at the last, that the redeemed chattel should not be assets, but the executor as his own proper goods, though the first three judges were of a contrary opinion, *viz.* that the goods redeemed should be in the executor as goods of the testator. And I must confess, that I cannot yet find good reason in that book's resolution, except we take the case there to be such as that which was put and reported by the Lord Dyer, *per* Henry 8, *viz.* that the money paid for redemption was as much as the full value of the thing pledged or mortgaged; or else shall admit the case to be, that this redemption was not a payment at the day conditioned. As to the first, it were rare if any should lend money upon mortgage, where the thing mortgaged is of a better value than the money lent; rare also, that an executor should take care to redeem with his own money that which should yield no benefit or advantage to him, or his testator. I will therefore scan and examine the point, since the same may come frequently in use: and thus may the more decently do, because the Lord Dyer, in the margin of the case by him rep

to aforesaid, saith expressly, that the said other *tempore* Henry 7, was not at all adjudged, himself having viewed the roll, which he there sets down, and the names of the parties; we will therefore put the case thus: *A.* possessed of a lease for sixty years of one hundred pounds land, mortgageth it for five hundred pounds; or be it that the mortgage or pledge be of a jewel or piece of plate for half the value; and now before the day limited for payment and redemption, *A.* having made *B.* his executor, dieth, and *B.* at the time and place maketh payment as was conditioned: now the question is, whether this lease, plate or jewel, being worth much more than the sum for which it was mortgaged, shall be in him wholly in his own right and to his own use, or partly, if not wholly, as executor to *A.*, so as to be subject to the payment of debts and legacies. Here it must be clearly admitted, that *B.* was enabled to this redemption only and merely by the condition annexed to the mortgage or pledging. It must also be admitted, that this condition, and the power or interest to take benefit thereof, came to him and was derived only as executor of *A.* This being premised, it must needs follow (as to me it seems) that the condition working and having his operation in the redemption to destroy the grant, mortgage, or pledging, it must needs make these things again the testator's goods *in statu quo prius*, and so to be in *B.* as executor; since in that right only he was entitled to take benefit of the condition. For what is it which hindered,

THE OFFICE OF AN EXECUTOR.

before this, from being the testator's goods. Nothing certainly but only the force and strength of the mortgage or pledge. Now by the redemption, that is become void, and hath lost its force; therefore the property of these things must now needs be as if no such mortgage or pledge had been, or as if it had at the first been void and of no force. Thus must the condition work for him who made it, viz. *A.* the testator: and those of the contrary opinion in the time of King Henry 7, do yet say, that by this redemption the testator is so much indebted to the executor as he disbursed for the redemption; which could stand with no reason, unless by it the property and interest should be reduced to the testator's *hock*. That thus it is, is also proved as to me it seems; by the case of mortgage of inheritance, upon which the heir making payment, according to the condition, is not now in as a new purchaser, but as heir, so as he shall have his age, and be *ward* even for his land; yea, it shall be *assets* in his hands for satisfaction of his father's; as other ancestor's debts: which in some respect is a harder case than that of the executor; for he hath means to satisfy himself of the money disbursed, either out of the thing redeemed, or other goods of his testator, but the heir hath no such means. Yet it will be asked, how the executor can be free from mischief: for if this thing redeemed be entire, as the cup or the lease, the whole will be taken in execution for the testator's debts. To admit this, yet here is one clear way of remedy,

viz. the executor may before such execution sell the thing, and so pay himself, and retain the surplusage to the testator's use; and the like of this is frequent in use, *viz.* for executors to pay off the testator's debt with their own money, and to make themselves satisfaction out of the testator's goods. Besides, it is not impossible that this redeemed thing should be thus in interest parted, that answerably and proportionably to the sum disbursed for redemption, with reference to the value of the thing redeemed, a moiety, or third part, or three parts thereof, should be to the executor in his own right, as his own proper goods, and the rest in him as executor. As *to that* *A.* and *B.* were tenants in common of such an entire chattel: *A.* maketh *B.* his executor, and dieth. Now hath *B.* one moiety as executor, and another as his own proper; and upon a judgment against him as executor, that moiety only which he hath as executor must be taken in execution. And here may be remembered, how in execution of a judgment, or levying of an amerciamment out of an entire chattel of more value than the sum to be levied, the whole is to be sold, and the surplusage above the debt or amerciamment is to be delivered back to the owner. For in all this debate, we must presume the thing redeemed by the executor to be of better value than the sum paid, else we may easily admit the whole to the executor. Again, the lease for years is not so entire a thing; I mean the land let, but that thereof par-

3 Bac. Abr.
2 Foul. 404,
n. 1.

Keilw. 63.

tion may be made, yea, enforced by action, between joint-tenants and tenants in common. But here will be objected the case of redemption by the daughter and heir, who though she hath a brother born after, so as now she is no longer heir, yet she shall, as the book saith, retain the land redeemed from the heir as a perquisite or purchase. As for this (which I will not oppose), the law so framed to the favour of the daughter, because of great mischief to her, if, being stripped of the rest of the inheritance by the birth of a brother, she should also lose that which her money had redeemed, without having any remedy to have her money again, or any recompense for it. But in the other case there is no much mischief, for that the executor may pay himself, as hath been showed.

Now on the other side, if the case shall be understood that the redemption was by payment after the day, then will I easily admit that the property or interest is in the executor to his own use; or that the condition now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, since it was at the will of the mortgagee to dispose of it at his pleasure; and any stranger, as well as the executor, might thus have redeemed, *viz.* repurchased it: therefore only equity, and not law, in that case can make any part of the value assets in his hands^(a). And so also, I think, if we

(a) If there be no defect of assets in the executors hands,

should admit in the other case of payment at the day, that the property of the chattel is to the executor as his own, and not his testator's goods, so part of surplusage of value can in law be assets; howsoever in equity.

Lastly, if the executor redeem by payment at the day with the testator's own money or goods, some will doubt but that the thing redeemed is in him as executor, and the money by him paid for redemption is well administered, the goods redeemed being of better value (a). But this way makes no difference whether the whole value of the goods redeemed shall be held assets, and the money paid for redemption stand drowned therein; or that that sum be still adjudged in the hands of the executor as assets, and only the surplusage of the thing redeemed over and above the sum paid for redemption.

the heir shall have the mortgage-money. Ca. in Ch. 285, *Thornborough v. Baker*.—(C.)

(a) It is lawful for the executors to redeem the pledges of their testator with their own proper goods, when they have not any proper goods of the testator. And although they have goods which were the testator's, yet peradventure they have not money which was their testator's, and he who hath the goods in pledge will not receive goods for money: and so if one to whom the testator was indebted, will not receive goods in recompence, then it is lawful for the executors to pay him with their own money, and retain so much of the goods of the testator; for it may be, that there may be a penalty, which will be forfeit before they can sell the goods of the testator. And also it is reason, that a man should have recompence for what he hath lawfully paid. Dyer, 2 Pl. 6, 7.—(C.)

Things accrued by Covenant or Assumption.

IF *A.* covenants with *B.* to make him a lease of such or such land by such a day, and *B.* die before the day, and before any lease made; no must *A.* make the lease to the executor of *B.*, and the lease so made to him shall be in him executor, and consequently as assets⁽¹⁾. This is proved by the judgment in the case between *Chapman* and *Dalton*, in the late queen's time. Yet I confess that it is not expressed in the resolution of this case, that this lease should be assets, but that the executors should have the term as executors, which implieth as much in my understanding; and the declaration, whereupon the defendant demurreth, sets forth the breach of that covenant to be *retardatione executionis testamenti*, so as the damages thereupon recovered, *viz.* 330*l.* were assets, and consequently also should the term have been, in lieu and recompense whereof these damages were given. The like law, if *A.* assume upon good consideration to deliver to *B.* by such a day twenty quarters of malt, or so many loads of coals or wood, or any other wares or merchandize, and this is not performed in the life of *B.*, but after his executor; it shall be to him as executor, and shall be assets in his hands, as well as the money recovered in damages for not performing should have been.

11 Vin. Abr.
231.
Plow. 286.

(1) So a covenant to renew a lease every seven years
2 P. Wms. 467.—(E.)

Of Things accrued by Remainder or Increase.

If a lease be made to one for life, the remainder to his executors for years, and he dieth; this will be assets in the hands of his executors, though it were never in the testator, as was in the latter end of the late queen's time resolved by three justices, the Lord Anderson only being of a contrary opinion: and there it was said that *Crammer's Case*, wherein the contrary in effect was resolved, was of little authority; for that there were first two judges against two, till after Mounson changed his opinion, upon a conceit that there the estate was by way of use; which could make no difference. Like law, where a lease for years is by will bequeathed to *A.* for life, and after to *B.*, who dieth before *A.*, although *B.* never had his term in him so as that he could grant or dispose it, yet shall it rest in his executor as his goods, and be assets. As for a remainder for years so in the testator that he might grant or dispose it at his pleasure, no doubt can be thereof; though the same fell not in possession to the testator in his life-time, yet no scruple nor doubt can be but that this is assets to the executor, even whilst it continues a remainder, and before it falleth into possession, because it is presently valuable and vendible.

2 Febl. 371,
n. (k).

Nor much of other nature to these are the cases, where the executor merchandizing with the goods of his testator maketh gain thereof.

11 H. 6, 35,
per Babington.

So if the sheep, or other cattle of the testator,

do breed, viz. bear lambs, calves, colts, &c. after the testator's death, even these which were never in the testator shall yet be assets; and so the wool growing upon the sheep after the testator's death. But there is one case worth the consideration, and worthy of some doubt, as I think, and that is this: One leaveth to the executor in lease for years of land worth 20*l.* by the year, and the executor, keeping this in his own hands one year after the testator's death, doth make thereof thirty pounds in clear gain above all charges, now whether, as to a creditor, the whole thirty pounds shall be assets, or only twenty pounds? And the case, simply thus put, shall be understood of an occupying and manuring without any stock of the testator's; and then if the executor did stock it with his own sheep and other cattle, as he must have borne the loss by rot or death, so is it reason that, if the manurance prove gainful, he reap the fruits thereof in recompense of his adventure, and of his industry, skill, and good husbandry (1). But if the testator's stock of sheep and cattle were (as of necessity, or for the better advantage of the testator's estate) continued upon the lease-land, then it is reason that the gain or loss, whethersoever of them God

1 Salk. 79.

(1) In many cases, there is a direction to the executor to carry on the trade after the testator's death. In such cases the profits are assets, for which he is accountable (10 Ves. jun. 110); or he may be directed so to do by the Court of Chancery. 1 T. R. 295; 2 Ves. 33; and 3 Rro. C. C. 459.—(E.)

sendeth, do redound to the testator's estate. Like law (as I think) if an executor, finding that he cannot instantly after the testator's death let the lease, at or near the value, shall therefore buy seed-corn, and hire the ploughing, &c. But it may be said, that the lease hath one entire valuation at the first upon the appraisement. To this I answer, first, that the value upon the appraisement is not binding, nor much respected at the common law: if it be too high, it shall not prejudice the executor; if too low, shall not advantage him: but the very value found by the jury, when it comes in question whether the executor have fully administered, or have assets or not, is that which is binding. Next I say, that if a long lease come to executors of land worth an hundred pounds by the year, and no sale is made thereof by the space of a year or more; now the term continuing of the like value as at first, it is no reason but the hundred pounds raised the first year should go towards the payment of debts and legacies, rather than any of them should be unpaid. These things, I mean the knowledge of them, are useful two ways, viz. first, to give light to executors, to discern what unto them of right pertains: next, to show unto creditors and legatees what, and how far, things shall be assets, that is to say, goods to enable, charge, and bind executors to pay debts and legacies. For whatsoever, any of these ways, cometh to the executors from their testator, or is recovered by any of these actions, shall be in their hands assets, the costs and charges of recovering deducted.

CHAP. VII.

WHAT MANNER OF INTEREST AN EXECUTOR HATH
IN HIS TESTATOR'S GOODS AND CHATTELS, AND
HOW DIFFERENT FROM THE COMMON INTERESTS
WHICH THEY OR OTHERS HAVE IN THEIR OWN
PROPER GOODS.

In F. N. E. the writ for the executor is, Qu. 4 boves qui fuer ipsius C. sub custodia. ipsius executor. apud N. invent. cepit. F. N. B. Eng. 193.

24 E. 3, f. 35.

2 P. Wms. 200.

33 H. 6, 34. Lit. tit. Villanage, 41. 1 E. 4, f. 1. Yet 39 H. 6, f. 15, a release of all actions by an

THE interest which an executor hath (as executor in the goods of his testator is much different from the absolute, proper, and ordinary interest which every one hath in his own proper goods, as may well appear in and by these points (1). First although a stranger take away these goods, the action of trespass for the executor is of general form, *quare bona sua cepit*, calling them his goods; whereas a man outlawed in debt, &c., or convicted or attainted of felony or treason, forfeited all his own goods, yet these which he hath as executor shall not be forfeited. If a villain be made executor, his lord cannot take these goods though he may take all the villain's own goods and for taking such goods, or for a debt due to

(1) And it seems that he may delegate his power to another; as by granting a letter of attorney to act as executor, the acts of such attorney bind him, but not to charge him in his own right for debts due by the testator. *Homes v. Baillie*, 2 H. Bl. 618; *Gardner v. Baillie*, 6 Term R. 59 —(E.)

the testator, a villain may sue his lord. Nay, if the executor grant all his goods, some good opinion hath been, that these which he hath as executor should not pass; yea, the Lord Dyer so held in the late queen's time, with this difference, viz. where the grantor is named executor in the grant there the goods which he hath as executor should pass⁽¹⁾; but otherwise, if he be not named executor in the grant. And that this opinion is probable, will farther appear by that which followeth.

executor, extincts actions as executor. But Frowick is against it in 26 Hen. 7. Kel. 64. Villain may sue his lord in such cases, and recover damages to testator's use. Co. Litt. f. 12. 2 Roll. Abr. 58, Pl. 8. 1 Leon, 263. Shep. Touch. 94. 2 P. Wms. 280.

Secondly, the executor cannot by will give or bequeath the goods he hath as executor; and if he die intestate, and administration of all his goods is committed to *J. D.*, yet hath he nothing to do with the goods which the intestate had as executor to his testator: thus all his goods reacheth not to his goods as executor.

The commission of administ. is, omnium bon. et catallor. jurum et creditorum quæ fuer. the intestate's.

Thirdly, whereas a man's goods stand liable to the payment of his debts both in his life-time and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognizance, statute, or judgment had against him⁽²⁾. And if such a one die in-

See these so resolved in Pl. Com. 525, inter Bunsby and Grantham. P. 20 Eliz.

(1) Or, unless it is said, he have no other property. Ld. Raym. 1307.—(E.)

(2) So, if he become bankrupt, the goods of his testator cannot be seized, unless there be direct evidence of his having appropriated them, or he consent thereto, that being equivalent to an alienation by him. 11 Vin. Abr. 272; 3 Burr. 1309; 4 T. R. 621, and cases *in notis*; 1 Bos. & P. 233; 1 P. Wms. 319; 1 Atk. 158.

So, if there be several executors, the interest goes to the

11 Vin. Abr.
421.
Plowd. 525.

debted, leaving to his executor much goods as he had as executor; these are not assets in hands liable to the payment of his debts, but for the payment of the first testator's debt legacies. Therefore a *quo minus* brought by executor, showing that he was not able to pay the King's debt, because the defendant debt from him a hundred pounds, which he owed as executor to J. S. was overthrown; for this could not be intended, saith the book, that the King's debt could be satisfied with that which the plaintiff should recover and receive as executor. Whereas a woman being possessed of any chattels personal, viz. moveables goods are devested out of her into her husband by marriage, so as if he die, and she over-live, it be not hers again, but her husband's executor

surviving co-executor, even though he hath refused; he renounce after the death of such co-executor, administration *de bonis non* must be obtained, whether he dies intestate or not. 11 Vin. Abr. 68, 69. 114; Hard. 111. If there be two co-executors, and one die, making a will the other surviving die intestate, inasmuch as all the property survived and became vested in the latter, administration must be obtained to the original testator. 11 Vin. Abr. and *infra*. 101.

So a term in the hands of the husband, in right of his wife as administratrix, is not extendible for his own use. Cro. Eliz. 291. But where her own acts, before marriage, amounted to a conversion, and her husband afterwards died, they cannot defeat an execution by setting aside the property only as the representative of her testator. 1 B. P. 293—(E.)

administrators; and if she die, all be the husband's without being executor to his wife. It is not so of the goods which he hath as executor; these still remain in and to her if her husband die; and if she herself die, for that she hath them as if were in another's right, viz. as she represents the person of her testator, her husband shall not have them, if he be not his wife's executor, and so executor to her testator(1).

Lastly, whereas the writ of trespass seems to make no difference between one's own goods and those he hath as executor, that being a possessory action or suit grounded upon the possession; yet done to an action of detinue, which more tastes and participates of the right, and there are they differenced: for where my own debt, when I sue, the writ saith, *debet et detinet*, viz. that the defendant owes me and detains from me that sum; yet when I sue as executor, the writ saith not *debet*, he doth owe me, but *detinet* only, he detains from me, as admitting that he is not debtor to me, though he should pay me. And so where I am sued as executor, the writ makes me not a debtor, but a detainer: otherwise, where in my own right I owe and I am sued for a debt. Accordingly, where judgment in an action of debt is given

The writ may be in his name only out of whose possession the goods were taken.
Co. l. 5, f. 51.
If the action be of such a nature that he ought to name himself executor, it shall be in the *detinet* only, otherwise *e contra*.
20 H. 6, 5.
5 Co. 32.
Winch. 80.
Lane, 80, S. C.

(2) And even if he hath sued jointly with her as executrix of a debt due to her testator, and she die after judgment, and before execution, can he have execution; for it belongs to the testator's representative. 1 Roll. Abr. 589, tit. Execution. (B.)

34 H. 6. 45.

against one as executor, it is not generally that the plaintiff shall recover against him, but he shall recover of the goods of the testator; and therefore upon this judgment no *capias* lieth against him, to enforce him to pay by arrest of his body, because he is not properly debtor. But if after it be returned, that he hath wasted the testator's goods out of which the said debt should be satisfied, then, he having made himself a debtor, a *capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in execution. So also in some cases of false plea pleaded, for where the judgment is *de bonis propriis*, the plaintiff may have a *capias ad satisfaciendum*; and that judgment is in divers cases for the damages, although not in many for the principal. As for the *capias* before judgment, in the mean process against an executor, that is because of his contumacy in not appearing upon the former process.

The reason of this different interest between an executor and another, or between the same man's having goods as executor and others in his own right, as also of the different manner of one being indebted as executor, and otherwise in his own right, is well expressed by the Lord Coke, in *Pinchon's Case*, viz. First, that the goods which one hath as executor he hath not in his own right, but *in auter droit*, that is, in the right of another, meaning his testator (1). Secondly, the

(1) Hence the rule, that if an executor hath the reversion

executors are but the ministers and dispensers (a), or distributors of their testators goods.

Co. lib. 9. 88, b.
See this also,
11 Vin. Abr. 54.
Plowd. Com. 5.
20, a. 182. 525.
2 P. Wms. 212.

*Of Alteration of Property in the Executor's Hands,
so as some Goods become his own which he had
as Executor.*

To this head or chapter, treating of the difference between the interest in goods as executor and others had merely in one's own right and to his own use, it is not impertinent to consider how that which one hath at the first as executor may be changed in property, and become the executor's own to his own use, as other his goods which he had not as executor. Here let us first

(a) Note, That suits in Chancery are admitted for distribution of the surplusage of intestate's personal estates (after the funeral expenses, debts, and legacies are fully satisfied), upon the statutes of 22 & 23 Car. 2, c. 10; 2 Vent. 362; 35 & 36 Car. 2.—(C.)

in fee in himself, and the term come to him as executor, it shall not merge, but shall remain subject to the debts and testamentary disposition of his testator. 2 Bl. Com. 177. So, if the term be devised to him for payment of his testator's debts, it shall continue *in esse* as to creditors and legatees. 11 Vin. Abr. 229. Or if he hath the term in right of his wife executrix, and he purchase the reversion, now is the term extinct as to her, but not as to creditors. *Id.* 236; Moore, 54. And where executors carry on a trade for the benefit of the estate, they do it as individuals, and at their own risk, unless it be with the sanction and by the direction of the Court of Chancery. *Barker v. Parker*, 1 T. R. 295.—(E.)

consider of ready money left by the testator since pieces of money, viz. shillings, pence, and half-pieces of gold, cannot be one from the other, it must needs follow these coming to an executor from the testator must in some sort be altered in property, though the executor shall be said to have as much in money or value, yet can it not be discerned which money in his house was the testator's, and which his own. Consequently the sheriff, upon the *fieri facias* for a creditor hath recovered against the executor a debt by the testator, cannot take away money in execution as the testator's, in my opinion. And if thereupon *devast.* shall be returned, to be done shall be done.

2 El. Dy. 185.
This divers
books affirm,
20 H. 7, 4, and
Kel. Rep. 59,
and 2, 3 El. Dy.
117. 6 H. 8.
Dyer, f. 22.

But what if the testator were indebted to the executor, or if the executor, not having money of the testator's, or otherwise, shall be indebted of the testator's with his own money? shall we say of the conversion or alteration of some of the goods from being his as executor to be his merely in his own right? Hereof I have showed elsewhere my conceiving, which is thus: that except either he have in his hands money of the testator's (for of that it is easy to make a proportionable change), or unless there be to him owing from his testator, or by him for his testator, amount to the full value of the testator's goods in his hands, or do exceed the same, no alteration can be, until some effectual declaration by the executor made, which

Plow. 554.
So of a legacy in
money given to
the executor.

goods not exceeding the debt unto him he will have to be his own: for where the testator's goods exceed this debt to him, the property of all cannot be changed; and of what part shall the law adjudge the change, till choice by the executor? It is good therefore for him to do as the mother-guardian in socage, who is to endow herself, calling her neighbours, and expressing to them which part of the land she will have for her dower. So let the executor do. But let him take heed that his election or declaration exceed not his debt, lest it be void. And that such particular election is to be made, seems to me proved by the case of 21 E. 4, f. 21, b., where the payment of money, and detaining or taking of a horse of the testator's, is mentioned (a). But Choke there says, this cannot be done without the

See 2, 3 EL.
Dyer 187, b.

(a) A man possessed of divers dead chattels made two executors, and one of them got the goods, and disposed by discretion divers sums of his own proper money *in piis usibus et operibus charitatis*; as in payment of taxes for a poor town, and in reparations of the church, &c.; which sums amounted to more, or as much as the value of the chattels; to the intent to retain the goods of the testator as his own proper goods, and died possessed of the said goods, and made executors. And after his death the goods came to the hands of his executors, against whom the surviving executor brought an action of detinue for the goods aforesaid. And the defendants pleaded these payments and disposition of their testator, and the conversion of the property as above, and justified the detainer as the proper goods of the testator, for execution of the testament, &c. And it was taken for a good plea; and issue taken that the chattels were of greater value than the sums above. Dyer, 187, Pl. 6.—(C.)

ordinary's assent. And the reporter thinks, though the ordinary do assent, yet the property shall not be turned into the executor as his own.

Another alteration is of the profits of a lease come to the executor from the testator: for since no more thereof shall stand in the executor as assets than so much only as exceeds the yearly value, according to the resolution in *Hargrave's Case*, it must needs follow that the residue of the profits must be the executor's, he paying the rent out of his own purse, as that case resolves in consequence, viz. that he shall be sued for it in the *debit*, and in the *debitum* only as for the rent due before the death of the testator. Thus though he have the lease as executor, yet part of the profits are merely his own, not as executor.

Co. lib. 5. f. 31.
b.

And looking back upon this case, we may discern a necessity sometimes of the executor's paying with his own money for his testator's debt: as where the testator being to pay a rent at Michaelmas or our Lady-day, he dies a day or two before; or to put it more clearly, a day or two after the feast, not leaving any goods to pay the rent, other than the future profits of the lease here, unless that executor will forfeit the lease, he must lay out of his own money.

Now, if in this and other like cases he could not do this until he had under seal, or by act of the court spiritual, an assent of the ordinary, it would be an extraordinary trouble to executors.

20 H. 7, 5, a. I find also, *tempore* Henry 7, another mean of altering property, to wit, where a *fieri facias*

comes to the sheriff to sell or levy a debt of the testator's goods: now, saith the book, may the executor buy these goods of the sheriff as well as another; and if he do, the property which he had as executor shall be turned into a property *in jure proprio*.

If an executor amongst his testator's goods find and take some not his, and after, these being claimed by the owner who left him in the custody of the testator, the executor not crediting the claim, still keeps them, and the owner thereupon recovers damages in an action of trespass, or of trover and conversion: now (and so in all other like cases) are these goods become the trespasser's property, because he hath paid for them: therefore it is not strange, if in like manner an executor, paying out of his own purse for or in lieu of the testator's goods (1), have so much of them (whose no certainty) changed in property, and become his own. This is but put as an instance understood with the exceptions and cautions precedent.

20 H. 7, Kew.
Ca. 86.

(1) Where an executrix gave an acceptance for a debt of the testator, under an agreement to renew and assets were received, this was construed to mean assets sufficient, in the regular administration, to satisfy it; and she was not precluded thereby from reclaiming a sum in satisfaction of a bond debt to trustees, for her own benefit. *Bowerbank v. Mowbray*, 4 Taunt. R. 844.—(E.)

CHAP. VIII.

OF SOME CASES AND QUESTIONS BETWEEN
EXECUTOR AND THE HEIR.

21 H. 6, 30.
If other goods
taken among
them, he is ex-
cused.
21 H. 7, 25.
Vide lib. intr.
640. It is so
pleaded.

43 Ed. 3, 24.
Bro. 145, makes
a que. if it be
locked.
Flow. Com. 280.
43 Ed. 3, 2.
10 Ed. 4, 5, 6;
and see Cro.
Jac. 204.
Harg. Co. Litt.
56, b.
Of the deed,
execution first.

THE executor may in convenient time after testator's death enter into the house descended to the heir, for the removing and taking away of goods, so as the door be open, or at least there be in the door; and this I understand of the door of each room. For although the door of entry into hall and parlour be open, the executor may by that justify the breaking open of the door of any chamber to take goods there, but only take those in the rooms which be open. And is proved, as to me it seems, by the case of a chest with evidences, which, saith the book, the executor may take and put out the deeds, delivering them to the heir, viz. the chest being unlocked as I understand it (1). Now a chamber or room within a house locked, is an inclosure better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as *damage feasant*.

Where the testator recovers land and dam-

(1) But if he cannot get possession without force, he may resort to his remedy by action. 11 Vin. Abr. 267; Touch. 470.—(E.)

or a deed and damages, he dying before execution, the heir shall have execution for the land or deed, and the executor for the damages: but *tempore* Edward 4, it is said, that until the heir sue a *scire facias*, the executor cannot sue execution for the damages.

If a creditor be made executor by his debtor, and pay himself part out of the goods, he cannot sue the heir for the rest, because the debt cannot be apportioned; but otherwise he may, saith the book: yet *quære*, if he do take upon him the executorship, and have goods sufficient to pay all. 12 H. 4.

If a debt be recovered against one who dieth before execution sued, leaving goods sufficient to satisfy; now shall not the land descended to the heir be charged therewith, nor by like reason any land conveyed after judgment. 7 H. 4, a. 31. See Bro. Ex. 124.

See a good difference, where land is conveyed upon condition of payment to the vendor, his heirs or assigns, and he died before the time, and where it is to be paid to the vendee, his heirs or assigns, and he dieth: in the first case payment shall be to the executors, but not in the other. Co. l. 3, f. 90, 91. To like purpose see more, Littl. f. 77, b. 2 El. Dyer 281. Plowd. Com. 291. 31 H. 7, 4.

What things pertain to the heir, and what to the executor, is before showed. As for Frowick's opinion, that where goods be mortgaged upon condition, that if the heir or executor pay, &c. here if the heir make payment, he should have the goods, I see not, for my part, how that can be.

A DIRECTORY FOR THE FOLLOWING CHAPTER.

- A. *All (as but one) represent the testator's person, and must join and be joined in suit, and e contra.*
- B. *Where one alone must answer suit, and how.*
- C. *When they differ in plea, the best shall be taken, but one may confess alone.*
- D. *One, as well as all, may give assent, or release the whole.*
- E. *One cannot give, nor release to another, nor divide.*
- F. *The possession of one is the possession of all, to what purpose.*
- G. *If the survivor die intestate, the testator is intestate though the other executor left an executor.*
- H. *Executor included, in the person of the testator, and represents it, is his assign; all one, and e contra.*
- I. *What change by death of the testator, touching proceeding in suit.*
- K. *Proceed to or in execution; where without scin facias.*
- M. *Whether the executor stand in his own quality, or in the testator's.*
- N. *Where one alone may sue.*
- O. *In suit for them, such as will not join shall be severed, and the other may sue and prosecute alone: consequently inde.*
- P. *Death of one executor, plaintiff, or defendant, where abates writ.*

CHAP. XI.

HOW EXECUTORS STAND BETWEEN THEMSELVES,
AND IN REPRESENTATION OF, OR RELATION
TO THE TESTATOR, AS HIS ASSIGNEE OR DE-
PUTY, OR AS THE SAME PERSON WITH HIM;
AND WHERE AND TO WHAT PURPOSE, AS
OTHER PERSONS.

FIRST, all of them do represent the person of the testator, and therefore must they all join in suit against others, and in suit by others they must be all made defendants, or at least so many of them as do administer: for though the executors themselves must take notice by the will how many executors there be, and must frame their suit accordingly, creditors and strangers need not take notice of any more than do administer and execute the office of executors (1). For this reason, as I take it, in the time of King Edward the Third, where two executors were of a term, and the reversion was granted by fine, mentioning but one termor, and thereupon a *quid juris clamat* accordingly brought against that one

Are as one person, therefore cannot plead several pleas in abatement.
37 H. 6, 17.
39 H. 6, 44.
38 E. 3, 9.
Bro. Ex. 13.
Bro. Ex. 20, 21.
Therefore one executor sued, if he pleads that there is another executor not sued, must plead that he did administer.
9 H. 6, 44.
Bro. 13.
33 H. 6, 38.
Bro. 20.
32 E. 3.
Quid juris clamat, 5.

(1) So, their interest is joint and entire, and may not be severed; and, in case of death, vests in the survivor. Com. Dig. Adm. B. 12; 3 Bac. Abr. 30, 9; Co. 36; Dy. 23, b. 160; 2 P. Wms. 121; 2 Ves. 267.

13 H. 4.
Aid, 186.

They shall have
but one essoine
among them all
before appear-
ance, and ano-
ther after.
A.

Ed. 3, c. 3.

B.
But not if he
appear at the
summons, 1
E. 4, 1. 14 H. 4,
f. 11. But the
plaintiff must
declare against
all. He need
not, but he may
admit another

executor; this was held good enough, though if
other executor was not named in the suit: belike
because that one (who indeed was the testator's
wife) did only occupy the land, and take the pro-
fits thereof; for else, since all the executors re-
present the testator's person, all must have been
named. Therefore did the judges resolve, in the
time of Henry the Fourth, that where a lessee for
years made two executors, and one of them was
distrained by the lord for rent, who avowed upon
the lessor, that executor shall have aid of his
fellow-executor, to the end that both might have
aid of the lessor, which one alone could not
And upon this reason, viz. that the executors
represent the person of their testator as one
person (for so speaks the parliament); it was
enacted in the time of Edward the Third, that
the executors, though never so many, shall have
but one essoine, either before appearance or after,
because their testator, whose person they repre-
sent, could have no more (a).

(a) If a man make a lease for life to one, the remainder to
his executors for twenty-one years, the term for years shall
vest in him presently, for even as ancestor and heir are co-
relatives, viz. one cannot be named without relation to the
other as to the inheritance; as if an estate for life be granted
to A. the remainder to B. in tail, the remainder to the heirs
of A. The fee is vested in A., as it had been limited to
him and his heirs; even so the testator and executors are
relativa as to any chattel: and therefore if a lease for life
be to the testator, the remainder to his executors for years, the
chattel shall vest in the lessee himself, as well as if it had been
limited to him and his executors. Coke's 1 Inst. 54, b.—(G.)

It is farther also enacted by the said statute; that where two or three executors or more be, they being sued in an action of debt, though all do not appear, yet such one of them or more as doth or do appear at the grand distress, shall answer alone without his or their companions. And this statute hath been taken by equity in three respects. 9 Ed. 3, stat. 1, c. 3 (a).

First, touching the persons; that it shall extend not to executors only, but also to executors of executors, yea, to administrators also; though the statutes speak only of executors.

Secondly, touching the action; whereas the statute speaks only of the action of debt, it is taken by equity to extend to other actions, as the writ (b) *de rationabili parte bonorum*, and *detinue*:

to appear and plead, after 7 H. 4, 12. But process must be continued against all. 7 H. 6, 35. Executors of executors by equity. 30 H. 6, 45. Bro. Ex. 9. 28 H. 6, f. 4. 14 H. 4, 23, 24. So negatively. 22 H. 6, f. 1. 28 H. 6, f. 4. 3 H. 6, 35, a. 39 E. 3, 5. There is not merely as executors; it is out of the stat. 11 H. 4, 63, as if in Deb. & det.

(a) And if judgment pass for plaintiff, he shall have judgment and execution, against them that have pleaded, and against the others named in the writ, of the testator's goods, as well as if they had all pleaded.

A. and B. were bound jointly and severally to C.; A. made D. his executor, and died; D. made C., the plaintiff, the obligee, his executor, and died. C. the obligee, brought debt upon this obligation against B., who pleaded that A. made D. his executor, who made the plaintiff his executor, and that the plaintiff had administered the goods of A.; but saith not to the value of the debt, nor to what value, but generally that he hath administered the goods; upon which the plaintiff demurred, and had judgment: for the obligation being joint and several, although that one of the obligors shall be discharged in this manner, yet the obligee may sue the other, if he hath not obtained full satisfaction by the administration. Lev. 2, p. 73. *Cock v. Cross*.—(C.)

(b) The writ *de rationabili parte bonorum* lieth against the

yet perhaps the latter action will be said not to be maintainable against executors for their tes-

executors, by the wife, or sons, or daughters of the deceased respectively, for their respective shares of the goods, after debts paid and funerals performed; which is by common law, viz. one third part for the wife, another for sons and daughters, the third for the executors; but the writs rehearse the custom, F. N. B. Eng. 270; and there must be a custom in some county, &c. to enable the wife or children to the said writ; and so it hath been resolved by parliament, 3 E. 3. *Detinue* 156. 40 E. 3, 38. But such children as be reasonably advanced by the father in his life-time, with any part of his goods, shall have no further part of his goods; for the words of the writ be, *Nec in vita patris promoti fuerunt*. 1 Inst. 176. B.

The wife of Walter Pheasant, who was an orphan, had her portion in the chamber of London, and after marriage, Walter took out 40 *l.* thereof, and by will gives his said wife her portion in the chamber of London, being 2,800 *l.*, and other things to the value of 1,000 *l.*, on condition she renounce her dower: she accepts this legacy before, and, after her husband's death, the executors of the husband exhibit their bill in chancery against the widow to renounce and release her dower; and the widow brought a cross bill against the executors of her husband, the mayor and commonalty, and chamberlain of London, for her portion in the chamber of London, and insisted that her portion belonged to her, in regard the security was unaltered by her husband in his life-time, and so was as much as if it were a debt due to her by bond. The lord keeper conceived this money in the chamber of London was a debt, for the chamber paid interest for it, and so the widow entitled to it; and the acceptance of a collateral satisfaction will not bar her dower, according to *Vernon's Case*. Ca. in Ch. 181, 182, *Pheasant's Case*.

By the custom, it is to be paid at the full age or marriage of the female orphan, and it was the laches of the husband he did not recover it: it was a chose in action, and not de-

act, but for their own only. But we are
 not to come so far as to determine what is main-

and trover would not lie for it, &c. And the in-
 n which was obtained to stay proceedings in the writ
 er was dissolved. 2 Vent. 340.

in which exceptions there are made these observations :
 the father should by his last will and testament forbid
 the child to have any portion of his goods, such will is such
 void, and the child may notwithstanding recover his
 part or portion : also, if the father should leave his child
 in possession by the rate of the inventory his part comes to
 where he might refuse the legacy, and recover his full
 notwithstanding the will : or if the father should
 put any condition upon the said portion, as to be paid
 years after his death, or the like ; yet the child may
 recover it presently after his father's death, and recover it
 within the seven years be out : for it is presently due upon
 the father's death, notwithstanding his father's will to the
 contrary ; and if the father by his will should bequeath the
 portion after the child's death to any other person, in such
 case the will is void, and the portion shall go to the execu-
 administrators of the child after his death. But now,
 by 5 W. & M. c. 2, from and after the 20th day of
 1693, persons inhabiting, or who shall have any goods
 in the province of York, may by their last wills dispose
 of their personal estate as they shall think fit ; and their
 children, and other kindred shall be barred to claim
 any part of the personal estate in other manner than as by
 wills shall be appointed. This act shall not extend to
 the cities of York and Chester, who are or shall be freemen
 of said cities, inhabiting within the same, or the suburbs
 thereof at the time of their death. See 4 & 5 W. & M. c. 2.
 By 13 Ann. c. 5, it is extended to the city of York.
 It is the custom of many places, especially within the
 city of York, that if the testator have a wife or child at
 the time of his death, that then he can but dispose of half of

tainable, but whether, before all the executors do appear, he or they which have appeared shall be put to answer; and so to bring it to decision whether the action be maintainable or not.

such his clear goods, and the other half is to go to the wife or child; and if he have both a wife, and child or children at the time of his death, then the goods are divided into three parts; whereof one part is to the wife, another to the child or children, and the other third part, called the death part, is left to his disposing; and if no disposition be made thereof, it falls to the executor. But not here, that if the child or children were heirs to the testator, or were advanced by the testator in his life-time, then the testator may devise one half of the clear goods, and the other half shall go to his wife. *F. N. B. Bre. de Rat. part bonorum. Vide 4 & W. & M. c. 2, and 2 Ann. c. 5, which give privilege there to dispose of their personal estates as in other places.*

Note, where the wife and children ought to have a rateable part of the goods of the deceased, be it third part or half, in the case is, there also they ought to have a like part of the debts due by the deceased, after they are recovered by the executor or administrator; but of leases they can have no rateable part, where they use to have a rateable part of the moveable goods and debts recovered, unless it be by special custom of the city, county, deanery, or place where the testator dwelt, and had such leases. *P. Swinb. part 3, sect. 16.*

This rateable part of the goods to the wife and children, is saved to them by the statute of *Magna Charta*: but not the wife or children cannot sue the executor or administrator for their rateable parts till all the testator's debts be paid, and then what remains is to be divided according to the rule aforesaid, into two or three parts, before any legacies be paid for they must all be paid out of the death's part after the division. *Mag. Ch. c. 18; F. N. B. 284, 4to edit. b.; Co 2 Inst. fo. 33.*

think also that in the action of covenant, and all other actions against executors as executors, he which appeareth must answer without his companions, though the greater opinion in the *quadragesimes* were contrary touching the action of covenant. But as for the subpoena against the executors, which is to make them to answer to a suit in equity, that hath been, *temp.* E. 4, taken to be out of the reach and intent of the statute. So also of the *latitat* in the King's Bench, as was held in the same king's time; except all the executors, making up the whole representative body of the testator, be in the custody of the marshal, one or more of them who are there shall not be enforced to answer: and so was it also lately held in the King's Bench, where Master Justice Houghton gave an excellent reason that this case is out of the said statute, *viz.* for that this writ doth not mention any debt, or name the defendant's executors.

Thirdly, and lastly, That statute is extended by equity to other writs or process; for where the statute speaks only of the grand distress, and the executors appearing thereupon, it hath been many times ruled, that when he or they appear upon the attachment, *capias* or *exigent*, answer must be, though the rest appear not; for so the word distress is taken for all compulsory means, or enforcement of appearance. But where the statute reacheth not, *viz.* when the process is determined against one or more, as by outlawry, &c. there the rest must answer by the rules of

B.
Cont. 47 E. 3,
22. So 7 E. 4,
20, 21. 3 H. 4,
20. In sci fac.
upon a pardon
by a defendant
outlawed at
the suit.
47 E. 3, 22.
Only Fenold in
the affirmative.
8 Ed. 4, 5.
9 E. 4, 12, 13.
B.
20 vel. 21 Jac.
Regis.

B.
1 E. 4, 1.
40 E. 3, 1.
B.
11 H. 4, 63.
C.
Or if but one
appear, 28 H. 6,
f. 364. judgment
against all.
See 9 E. 4, 12,
13. Where
B. who is not
executor, is
jointly sued
with A. and B.
confesseth, 21
H. 7, 25. Yet
7 E. 4, 7, they
may sever in
pleas not dila-
tory.

C.
 7 H. 6, f. 6, per
 Cottesmore.
 If they recover,
 and one of them
 prays a cap. ad
 sat. and the
 other a fieri fac.
 the first as best
 shall be granted,
 3 H. 4, 10.
 Bro. 44.
 So where the
 defendant is
 outlawed at the
 suit of two exe-
 cutors, and
 upon the scire
 facias after his
 pardon but
 one appears.
 21 H. 7, 25.
 9 E. 4, 12, 14.

the common law (a); except it be in the case of husband and wife executors; for there the wife cannot answer without her husband, nor doubtless can he without her, where she and not be executor; but where both be executors, there he may answer without her, but not she without him. When executors as defendants have appeared, if any one of them will confess the action, this binds and concludes the rest; but if one will plead one plea, and the other another, that (say some) shall be received which is best for the testator's state: so where they sue, such as will not prosecute shall be (b) severed, and the rest

(a) Debt in London against the defendant as heir, and is being removed in B. R. the question was, if he should find bail here, as he had done in the inferior court of London, where they always compel heirs and executors to find bail. Yet of executors, there are precedents where executors sued there, and having found bail there, were compelled to find bail here upon removal of the court: but no precedent being shown for finding of bail by the heir in such case, *per cur.* special bail was denied to be found in this case; and it was said, that Keeling and Hale had denied it in cases of executors, upon removal of the cause here. Lev. 2 p. 204; *Sir John Lawrence v. Blithe.*

(b) Where one executor will not prosecute with the rest, there is a judgment of severance after default on summons, viz. *Ideo confid. est quod præd. A. sequatur solus sine ipsis T. et R. versus præd. W. de placito præd. Vide Rast. Ent. p. 330, tit. Exec. in Severance.*

In all actions brought by executors, shall be summons and severance, because the best shall be taken for the benefit of the dead: and so in an action of trespass, as executor for goods taken out of their own possession, and the like account as executor. 1 Inst. 227.

without them may proceed; and, in like manner, where they pray to be received to defend their term, and one of them after makes default, it shall not be the default of all; but the rest, or he, if it be but one who appears, shall be received to uphold the defence of the term.

Thirdly, So where they plead a release to the testator or themselves, one after making default; this shall not be, nor make a total default in the executors, to induce a judgment or condemnation against them. Yet, in truth, each executor hath the whole of the testator's goods and chattels, be they real or personal, and each may sell or give the whole. One of them cannot give nor release to the other his interest; and if he do, it is void, and he who releaseth shall have still as much interest as he to whom he releaseth, because each had the whole before. Upon this reason, long since, where one of the two executors released but his part of a debt, it was held that the whole was discharged. And so, if one executor grant his part of the testator's goods, all passeth, and nothing is left to the other; for that each hath the whole, and there be no parts or moieties between executors. Therefore, also, though a lease for one thousand years, of one thousand acres of land, come to two executors or more, no partition or division can be made between them, because it is not between them as between joint lessees of land, where each hath but a moiety in interest, though possession of or through the whole.

21 E. 3, 13.
27 H. 8, 21, 22.
D. E.

C.
If an horse
come to four
executors, each
hath an horse,
and yet all four
have but one.

E.

D.

Amongst executors each hath the whole, and therefore if he grant his part, he grants the whole. But one executor may demise or grant the moiety of the land for the whole term, and so may the other do; and this way they may settle in friend or others trusted for them, a moiety for each either in several or undivided: but one of them cannot make a lease to the other of any part, so he had the whole, nor can one sue the other's executor. Yet if the testator devise to one of his executors all his goods, after such debts and legacies satisfied, there, after those satisfied, the executor may take the goods, and maintain an action of trespass against the other executor, if he take them from him, and consequently an action of *detinue*, for keeping or detaining them: but this is a legatee, his own assent perfecting the legacy.

6 H. 7, 5.

The possession of one executor is the possession of all the rest; so as if one appearing to suit, and the other making default in whose hand all the goods be which are not administered; if I say, here he that appears pleads that he hath nothing in his hands, this shall be found against him; for whatsoever any of the co-executors hath he also hath, and is in his possession; and shall the creditor recover, and have judgment, to be satisfied out of the testator's goods, as in his hands. And therefore if goods be taken from one, all may maintain an action of trespass there upon; for the possession of one is the possession of all. But the possession of one shall not be a

14 H. 4, 12.

Bro. 12.

F.

All must sue,

19 H. 6, 65.

Cont. 24 E. 3,

26.

It may be in his name only from whom taken, nor need he be named executor.

Bro. Exec. 31.

39 H. 6, 45.

F.

the possession of all, as to charge the other's own goods, whereof more elsewhere (1).

Where two executors be made, the one making a will and executors, and dying, if the other die after intestate; now, shall not the executor of him who first died be executor to the first testator, but he is dead intestate, because the surviving executor is so dead, and in him the executorship was wholly and solely settled by the death of his fellow before him. So administration *de bonis non admin.* shall be committed.

38 H. 8.
Bro. Exe. 149.
39 H. 6, 45.

The executors, or executor if but one, so represents the person of the testator, that he is in law his assignee by the very making of him executor: so as if one covenant to make a lease to *J. S.* and his assigns by such a time, and *J. S.* dieth before that time, and before the lease made (2); now

Co. lib. 5, f. 97.
n. 47.
H.
Chapman and
Dalton's Case,
Plow. 286. 288.
11 Vin. Abr. 156.
Harg. Co. Litt.
209.

(1) But where one executor, having received assets, pays them over to his co-executor, for the purpose of satisfying a bond creditor, who misapplies them, each is answerable for such misapplication to the bond creditor, nor can the first discharge himself upon the plea of *plene admin.* *Cross & ux. v. Smith*, 7 East R. 246—(E.)

(2) So a covenant to build a house on the demised premises. Lat. 261; 11 Vin. Abr. 158. So a power to make leases for lives, to *A.* and his assigns, held to devolve upon the executor of an assignee, after any number of mesne assignments. 11 Vin. Abr. 158; 1 Freem. 476; Co. Litt. 210; Harg. n. 1.

And it seems now settled that where the testator had only a contingent interest, though but a bare possibility, it is descendible, and his executor shall have it, when the contingency, upon which the interest was to arise, happens.

Sir Edward
Phitton's Case,
lib. 6, 79. b.
Co. lib. 2, f. 80.

must the lease be made to his executors as his assignees, representing his person: so also in a

Fearne's Cont. Rem. 444; 1 P. Wms. 563; 1 Vern. 296; 2 Atk. 616.

A legacy to A. to be paid when he comes of age, is immediately a vested interest, although payable at a future day, and his representative shall have it; but if it be devised to him at, or if he shall attain, the age of twenty-one years, they have no title to it. 11 Vin. Abr. 160; Carth. 52; 2 Vern. 199; 2 Vent. 342; 8 Ch. R. 112; Com. Rep. 719. Still, however, the contingent interest in the latter instances may be made absolute, by any direction which implies an intention to vest a present interest in the legatee; as by giving interest before the principal itself, would not by the devise become payable until the contingent period arrives. 2 P. Wms. 612, n. 1; 1 Vern. 462; 2 Vern. 673; 1 Atk. 501. 512; 3 Atk. 645; Prec. Ch. 318; Barn. 43; 2 Br. Ch. C. 305; 1 Vern. 118. But these distinctions are confined to interests arising out of personal estate. 2 Ch. Cas. 155; 1 Eq. C. Ab. 295; 2 Eq. C. Ab. 548; 1 Vern. 255; Barn. 329; 1 Br. Ch. C. 181. 298; 2 Id. 75; 3 Id. 471; 3 Atk. 427; 2 Salk. 415; 1 Burr. 227. And such interests must be specific and distributive, for they have not been allowed to prevail where a personal fund was distributable amongst children when they should come of age, so as to vest an interest descendible to their representatives, even though the same fund was charged in the mean time with their maintenance and education. In legacies charged on land, whether it be subject primarily or only as an auxiliary fund, the opposite rule prevails to that in the case of a personal fund. 2 P. Wms. 276. 515. 612; 3 Id. 134; 1 Vern. 204. 321; 2 Id. 92. 416; 2 Ch. C. 165; Prec. Ch. 267. 290. 318; Ca. Tem. Talb. 193; 1 Atk. 482. 502. 512. 555; 3 Id. 69. 112; 1 Br. Ch. C. 106, n.; 2 Id. 108. Exceptions have, however, been made in cases where the payment is deferred, not with reference to the legatee, but to the fund out of which it is to arise; but it is difficult to reconcile the cases. 1 P. Wms. 457; 2 Id. 513. 612, n.; 3 Id. 119.

condition to pay the feoffor or his assignee (a):
 let a lease to A. and his assigns during the life of
 B. shall not go to the executors of A. So where

A.
 So where the
 stat. of W. 1.
 gives time for
 proof to him
 whose goods
 were wrested,
 his executors
 may do it, if he
 die before the
 time.
 Co. lib. 5, 107, b.
 Co. lib. 6, f. 80.

(a) But if mortgage be to pay the money to the mortgagee,
 or his heirs, the mortgagor cannot pay the money to the
 executors of the mortgagee: for the law will never seek out
 person where the parties themselves have appointed one;
*in hoc casu designatio unius personæ est exclusio alterius, et
 pressum facit cessare tacitum.* But if the condition be to
 pay money to the mortgagee, his heirs or executors, the mort-
 gagor hath election to pay it either to the heir or executors.
 Inst. 210, a.

If feoffment be upon condition to pay money to the
 feoffor, or his heirs or assigns, at such a day, and before the
 feoffor makes his executor and dies, the feoffee may pay
 the money either to the heir or executors, for they are his
 assigns in law as to this intent. But if a feoffment be made
 upon condition that if the feoffor pay to the feoffee, his heirs
 or assigns, 20 l. before such a feast, and before the feast the
 feoffee maketh his executors and dieth, the feoffor ought to
 pay the money to the heir, and not to the executors, for the
 executors in this case are no assigns in law. 1 Inst. 210, a.

But if the feoffee make a feoffment over, the feoffor may
 pay the money either to the first feoffee, or to the second
 feoffee: and so if the feoffee dieth, he may pay it either to the
 heir of the first feoffee, or to the second feoffee. *Ibid.*—(C.)

72, 414; 2 Atk. 127. 130. 133. 507; 1 Br. Ch. C. 119, 120,
 note, 124 in note, 191. 193. 395; Barn. 327; Com. Rep.
 16; 1 Vern. 326. 347; 2 Id. 35. 72; 1 Ves. 44; 2 Id. 209.
 Where, however, the legatee dies after his interest is due
 and payable, it is clearly transmissible to his representative.
 Vern. 276. And if the interest is to arise out of personalty
 and realty, and the legatee die before the time of payment,
 the executor shall be entitled in respect of the former, not-
 withstanding the latter may sink. 2 P. Wms. 613.—(E.)

in a general pardon by Parliament there is an exception of persons outlawed after judgment, the person so outlawed shall satisfy the creditor who hath outlawed him (1). If the outlaw die before this done, his executor, as representing his person, may make satisfaction, and so make the benefit or the pardon to extend to his testator, for saving his goods, as if himself had satisfied his creditor, though he left him unsatisfied when he left the world, *et diem clausit extremum*. Yet where *A.* sold land to *B.* upon proviso, that if he paid to *B.* his heirs or assigns, &c. *B.* died; *A.* paid at the day to his executor, and it was doubted that it was not good; for the word assignee could not reach to him, being no assignee of the land. And where the executor brought an action of account upon a receipt by the hands of the testator, the defendant could not be admitted to wage his law (2); for that this was held a receipt *per auter mains*: yet it is clear, that if one by bond or covenant tie himself to pay such a sum at such a day, not mentioning his executor at all; yet is the

Also executors may have restitution for stolen goods, and a writ of error; yet the statute speaks but of the party.

A.

2 El. Dy. 180. Cont. where to *A.* the feoffor, his heir or assign. Co. lib. 5, f. 97. 2 El. Dy. 183. 101.

(1) Where executors of a person outlawed may satisfy and then take advantage of the King's pardon, but not before 6 Rep. 80, *Sir Ed. Phitton's Case*. And in the case of subject where executors shall have attain by stat. 6 Ed. restitution upon stat. 21 H. 8; administrators, a writ of error upon stat. 27 Eliz. *Ib.*

(2) For the same reason the action of debt on a simple contract lies not against an executor or administrator, and advantage may be taken of it upon a general demurrer *Barry v. Robinson*, 1 New. R. 293.—(E.)

executor bound, as included in the name or person of the testator (1). And where the statute of 23 Henry 8 gives the writ of attaint (in the course there mentioned) against the party that had judgment; it lieth against the executor, if he be dead; but therefore another reason is given. Where a man was bound that he would not sue upon such a bond, and he died, and his executor sued, this was held to be no forfeiture of the bond. So where one was bound to pay ten pounds within a month after request made to him, and he dieth before request; it sufficed not to make it to the executor, as Manwood said (2). It was likewise held, that the warrant of attorney put in for the plaintiff in debt, it sufficeth not for his executor

23 H. 8, c. 3.
H.
25 H. 8, 16.

M. 15 and 16
Elix.
L.
34 Elix. vel circuiter, Titherly and Laxeor, Walsh. in Ben. Reg.
26 H. 8, Bro. stat. Merchant, 43.

(1) So if bound to deliver a true rental to *A.* or his assignee, he must deliver it to the executor of *A.* Hob. 10. So upon an arbitration bond, to abide the award, the executor is entitled as assignee. 1 Lev. 316.—(E.)

(2) And where the condition was to pay a sum to the appointee of the obligee, and he died before making any appointment, the executor, being only an assignee in law, was held not to take it, for the condition was in favour of an actual assignee, and for his own use. Hob. 9; Godb. 192; Co. Litt. 210; Harg. not. 1. And the distinction between an obligation to pay to the assignee of *A.*, or to *A.* or his assignee, the executor takes only in the latter case, because the right was vested in *A.* 11 Vin. Abr. 161.

Where a testator had a right subject to an election, his executor shall be entitled to the same, or not, according as any immediate interest was vested, or not, in his testator before election; for then his executor may make the election as well as himself. Co. Litt. 144, b. 145; 1 Roll. Abr. 725; 726; Com. Dig. Election, B.—(E.)

to bring a *scire facias* upon the judgment. And if executors sue execution upon a statute in the name of a conusee, as if he were alive, this is void, and they may sue out a new extent; and this they may do without any *scire facias*, as well as the conusee might if he had been alive. But by Hussey, Justice, if the conusor in a statute staple be returned dead by the sheriff upon the extent, a *scire facias* must be sued out before extent proceed (a); and upon a judgment had, if the recoverer die before execution, his executor cannot, as himself might, sue out execution without a *scire facias* as is there said (b). Yet if after a *capias ad sat.* awarded, the plaintiff die before he be executed, the sheriff may proceed to the taking of the party, and is not subject to any action of false imprisonment: nay, if he suffer him to escape, he is chargeable, as *temp.* Elizabeth it was resolved upon the motion of Anderson; but withal it was held, that relief might be by *audita querela*.

Like resolution was in the King's Bench, after some doubt by Wray and the other judges, where the defendant died after a *fieri facias* awarded, and before it was executed; that the sheriff might

K.
9 R. 3, 8.
H. I.
15 H. 7, 14.
P.
15 E. 3, Respon.
1, con. upon a
stat. Merchant.
K.
Cont. Nat. Br.
267, upon a
Recog.

I.
H.
30 El. Rot. 31,
in Ban. Reg.

9 H. 6, 57, b.
6 H. 7, 6.
31 & 32 El.
Mosse & How.
Hill. 11 Jac.
Commin and
Bradlin.

(a) Executors shall not have execution of the judgment, or recognizance, in the time of the testator within the year, without suing a *scire facias*; but otherwise it is of a statute, &c. 2 Inst. 395.

(b) And a *certiorari* lies to them to certify the command of a fine. F. N. B. 328. And an *alias pluries*, and attachment against the judge's executors.—(C.)

proceed upon the goods in the hands of the executors.

But if the defendant in an action of debt upon a bond plead a tender at the time and place of payment, and tenders the money in court, where it rests, and then he dies; now shall not the plaintiff have this money, because the property thereof is changed, and become the executor's, as was held in the Common Pleas; but he is put to a new suit against the executor.

Yet where judgment is once given in a writ of partition for a termor, or in a writ of account; if the plaintiff die before the second judgment (needful in both cases); the executor is not put to a new suit, but may proceed by *scire facias* upon the former judgment, as the Lord Anderson held, upon the motion of Fenner, serjeant (a). Though

1 Leon. 304.
29 Car. 2, c. 3,
f. 16.
1 Sid. 271.
Baily and Bun-
ning. Qu. not-
withstanding the
stat. of Car. 2,
if the goods are
not bound as to
the party him-
self from the
teste of the exe-
cution, the stat.
being made for
the benefit of
strangers,
2 Vent. 218.
31 El. vel cer-
citer.
I.
Pasch. 28.

(a) *Scire facias* against an executor upon a judgment in *assumpsit* against the testator; the defendant demands *oyer* of the judgment; upon which it appeared, that the testator died after verdict had by the plaintiff upon *non assumpsit*, and before the day in bank (leaving the defendant his executor), and the judgment, upon which the plaintiff brought the *scire facias*, was entered in the next term upon the new statute made at Oxford; and the defendant pleaded a debt due to him by obligation of the testator of 100 l. and a judgment by the testator to my Lord Arlington, and that he had not assets above 40 l. which he retained to satisfy himself and the Lord Arlington; upon which the plaintiff demurred; and now the principal question was, If this judgment to the plaintiff should so relate, that it should be to all intents as a judgment had against the testator in his life; and the case was argued at the bar three several times, and judgment was given for the plaintiff. Lev. 1 p. 277; *Burnet v. Holden*.—(C.)

Trin. 36 El. in
Ba. Reg.
H. M.

Pat. 41 Eliz. in
Com. Ban.

before we found the executor not in points pen-
all one with the testator; yet in points beneficia
the testator includes him in some cases: as when
an abbot granted to his lessee to take estovers in
another's ground, it was held that his executor
though not named, should enjoy this during the
term, as well as himself should have done. And
whereas the statute of 23 Henry 8, c. 15, gives
costs to a defendant against a plaintiff suing for
wrong, or breach of promise, or the like, done to
the plaintiff, against whom it passeth by verdict
or nonsuit; it hath been resolved, that an exe-
cutor suing upon such wrong or breach of con-
tract to his testator made, should not pay costs,
because he is another person than the testator;
and so it is usual in experience. But if in such
the attorney of the executor misbehave himself
towards him, and for this the executor sueth him;
here, if it pass against him in manner as afore-
said, he shall pay costs, because this was a suit
for a wrong done to himself (a).

(a) The stat. 9 W. 3, 11, shall not alter the law as to
executors or administrators, in such cases where they were
not liable to pay costs of suit.

It is said that no action will lie against an executor for
costs given in chancery, against the deceased in a suit there.
Godb. 165. For it is lost when the party dies.

Executor brought debt upon an obligation, defendant
pleads *non est factum*, and found for the defendant; yet the
plaintiff shall not pay costs. Cro. Jac. 229, *Haywarth v.*
Darrie. The question was on the statute 4 Jac. c. 3. But
here he sued in another's right, and of matter which lay
in his conscience.

If *A.* recovers a debt as executor of *J. S.* and makes *B.* his executor, and dies before execution sued; *B.* is not put to a new suit, but may have execution upon that judgment. But if *A.* or *B.* died intestate, now could none as administrator to either of them, nor as administrator of *J. S.* have execution of this judgment; for the former hath no interest in any thing pertaining to *J. S.* and the latter cometh to title above the judgment, *viz.* as immediate administrator to *J. S.* who is now dead intestate, and derives no title from the executor who recovered. H.
28 H. 8.

If a conusee have a certificate into the Chancery upon a statute, and then dies before extent taken out, his executor is put to a new certificate, and, for obtaining of it, must make affidavit that no extent hath yet been taken out. 2 El. Dy. 110.
I.

If an alien join with his wife, who is executor in a suit for debt, and it cometh to issue, he shall not have trial *per medietatem alienig.* or *linguae*, as should be if he otherwise were party to a trial; as was held in the case of Doctor Julio. Yet if a nobleman sue as executor to another not noble, he shall for his nonsuit be amerced five pounds, as if he sued in his own right, as was conceived M.
21 E. 4, 77. By the same rule and reason, doubt-

Defendant pleads the plaintiffs were not executors, and it was so found, and yet he shall not have costs. 1 Brownl. 29.
But *D.* as executor brought trespass, and counts of his own possession, plaintiff was nonsuit; the defendant shall have costs upon the stat. 23 H. 8. Noy, p. 64; *Lady Digbey's Case.*—(C.)

less, a nobleman sued as executor shall not be arrested, nor shall any *capias* be awarded against him for not appearing. And if any trial shall be of any issue, there shall be two knights of the jury, as in other cases where a peer is party. Likewise where the wife is to have her convenient apparel, whereof the executor must not bereave her; if she be a noblewoman, it shall be answerable to her degree.

A.
38 E. 3, f. 8.
N.

If one executor only sell goods of the testator, he alone may maintain an action of debt for the money. So if goods be taken out of the possession of one executor, he alone may maintain an action, and that without naming himself executor (*a*).

P.
O.
3 H. 7.
L.
& 5 E. 2.
Fitz. pro. 802.
Cont. 38 E. 3, 13.
& 20 E. 3, tit.
Account, 78.

Some touch hath been before of summons and severance, whereunto be this added: If one executor will not or cannot conjoin in suit with the other, so as he is summoned and severed; now by his death after, the suit is not abated (*b*), 16 Ed. 2, Fitz. 111. Yet if he live till judgment,

(*a*) One executor may assign a term without the other, according to the opinion of the Lord Chief Justice Holt, in *Stonor's Case*.—(C.)

(*b*) *Assumpsit* against two executors upon the promise of the testator, issue *non assumpsit*; one executor died, which is suggested upon the roll, and the trial brought against the other, and verdict for the plaintiff; and, in arrest of judgment, it was moved by Jones, that the bill was abated by the death of one in cases of contract, otherwise in cases of *trespass*. 50 E. 3, 7; 40 E. 3, 26, b.; Fitzher. Brief 263. 344; and Plowd. Com. 186, b. In case of executors sued upon

he may sue execution, say other books, 13 Ed. 3, Fitz. Exec. 9; 11 R. 2, Priv. 2. Yet *quer.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, Mich. 14 & 15 Eliz. Dy. 319. And the reason thereof being, because he is no party to the judgment; by the same reason can he not sue execution upon it; for how can he have execution for whom there is no judgment given? Now the recovery is only in the name of the other executor. Yea, by the said last book, it seems that after judgment had, he cannot release the debt, because it is now altered in nature, and turned *in rem judicatam*; though at any time before judgment he might have released it, as both that last book saith, and the two precedent, *temp.* Ed. 3, and Rich. 2. Yea, in an action of account, after judgment had that the defendant shall account, the release of him severed as a good discharge to the defendant, as was resolved 48 Ed. 3, 14, 15. But this is not a plenary judgment, for nothing is recovered thereby; but another judgment is to be had after the account, which may be against the plaintiff, so as his release came before any debt or duty adjudged. What if the defendant be had in execution at the suit of the executor, who prosecutes it and

contract, the death of one doth abate the writ. But of that, in case of executors, the Court at first doubted; but at another day, having seen the case in Plowd. Com. 186, *Woodward v. Davies*, which is direct in the point, they resolved the writ should abate, and the judgment stayed. Lev. 1, p. 165, *Wirald v. Brand*.—(C.)

But by the stat. 8, 9 W. 3, c. 11, it shall not abate. See the statute.

escapeth? Whether may the severed executor discharge the sheriff or gaoler by a release? I think he may not.

2 H. 4, f. 14.
P.
9 E. 4, 12.
Bro. 34.

By that above, it is plain that if any one of the executor's plaintiffs die, the writ is abated; only where he so dying was before severed. Opinions have been different, as above appears: so also is it if one of the defendant's executors die. Yea, if the plaintiff creditor sue *A. B. and C.* as executors, where only *A. and B.* are executors, there by the death of *C.* the writ abates, or falls to the ground: yet *A. and B.* (as I think) might have pleaded in abatement, that they only were executors, traversing that *C.* was executor: but the book doth not so resolve. See 46 Eliz. 3, fol. 9, 10.

A. As *A. and B.* above might admit that writ against them and *C.* so if the writ or suit had been against *A.* only, and he so admit it, not pleading in abatement, the recovery against him alone is good. 9 E. 4, 12.

Outlaw may sue
in autre droit
as executor, &c.
Co. Litt. 128.
21 H. 6, 30.

M.
21 E. 4, 49, 69.
42 E. 4, 13, 14.
H. 6, 14, 15.

Co. Litt. 134.

One that is outlawed, or attainted in his own person, may yet sue as executor, because this suit is in another's right, viz. the testator's; but he that is excommunicate cannot proceed in suit as executor, because none can converse with him without being excommunicate, as a book says. Yet doth not this excommunication pleaded abate or overthrow the suit, but make that the defendant may stay from answering his suit until the plaintiff be absolved and discharged from his excommunication.

CHAP. X.

OF THE POSSESSION OF EXECUTORS, OR THEIR
ACTUAL HAVING.

1. *What shall be said so to come to their hands as to charge them.* 2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to executors, and, being come, shall be assets in their hands. Now, for that it is said in *Reede's Case*, that an executor shall not be charged with or in respect of any other goods than those which come to his hands after his taking upon him the charge of the executorship, let us now examine what shall be said and accounted such a full and complete coming to the hands of executors, as shall make them within the reach and charge of creditors and legatees, *viz.* for the payment of debts and legacies. As touching debts due to the testator, it hath been before showed, that until judgment and execution had, they be not assets in the executor's hands. Now then as touching other goods or chattels possessory, which are of two kinds, *viz.* real and personal, let us put the case thus.

Co. lib. 5, 33, b.
34, a.

The testator, at the time of his death, hath a stock of sheep in Cumberland, corn in the barn

Perk. 6, b.

in Cornwall, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, a lease for years in Norfolk, and his executor dwells at Coventry, *viz.* far from all these places; what kind of possession shall the law judge the executor to have in every of these instantly upon the testator's death, and before he come where any of the things be, either to see or to seize upon them (a)? In all the particulars above mentioned the law is all one, except the case of the lease for years; which if it be of land (as is most usual), then, because it is a settled and immoveable thing, the law doth not reach to it the foot of the executor, to put him in actual possession (for *possessio est quasi pedis positio*), until himself or some for him do actually enter thereupon. Nor indeed need the law help or supply the want of actual possession in this case, as in the case of moveables; since land cannot be carried away as goods may, and therefore is not subject to purloining or

(a) A man seised of lands in fee made his executors A. and B., and by his last will would, that his executors should have and hold the issues and profits of two parts of his lands, till his heir by the common law came to the age of twenty-one years, to the intent, that with the profits thereof, they should pay his debts, and perform his legacies, and for the education of his children. One executor died, the survivor made his executor and died, the heir being yet within age. The question was, if the executor of the survivor might meddle with the profits of the lands, and with the disposition thereof, during the nonage. And it seemed he well might; for it was an interest in the executors by the devise, and not an authority or confidence only. Dyer, 210, pl. 24.—(C.)

embezzlement as moveables are (a). But if the lease for years were of tithes, the executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintain an action of trespass against any stranger which shall take the tithes set out, though he, nor any for him, did ever before possess any of the said tithes, or came near unto them. But if the case were of a lease for years of a rectory, consisting not only of tithes, but also of glebe lands, into which entry may be made, as also livery of seisin in it; then it may perhaps be some question, whether such an actual possession in tithes shall be given by the law to an executor neglecting to enter, or not entering, into the glebe land. And so I leave the consideration of chattels real.

45 E. 3, 17.
21 H. 6, 43.

Touching things personal, in which the executor hath such an actual possession presently upon the testator's death, as that he may maintain an action of trespass against any stranger taking them away, or spoiling them, though he, nor any for him,

Co. lib. 5.
9 E. 4, 50.
Plow. Com. 281.
32 H. 6, 13.
14 H. 8, 22.

(a) A termor devised his term to one whom he made also his executor; the devisee entered before any probate of the testament, and occupied the land a year and more without any probate, and died. *Quer.* If his executor (if he made any), or if his administrator, if he died intestate, should have the term or not, or that the ordinary should commit the administration as of the first testator; and it was ruled there that the property of the term was in the executor by his entry, and executing of the devise without any probate. Dyer, 367, pl. 39.--(C.)

ever came near them (1); whether yet this shall be such a possession in the executors, and such a coming of these goods to their hands, as to charge them with payment of debts and legacies, yea, to make their own goods liable instead of these, is a point worthy of consideration.

And, doubtless, this thoroughly sifted will prove a case mischievous, whether way soever the law be taken. For, first, it must be admitted, that without the executor's laying his hands actually and particularly upon the goods in the house or fields of the testator, whither the executor hath resorted, he shall be said so in possession as to stand liable unto the creditors, so far as they extend in value, though, after, others purloin or embezzle them. Now, then, if distance of place shall make difference, where shall be the bound and limit of that distance? And if the executor may come after a stranger's taking or possessing of the goods, it is mischievous to creditors.

On the other side, if it shall be laid upon the executors to answer for all the goods whereof the testator died possessed, it will be mischievous for them, and deter them from taking executorship upon them; since much purloining may be even

11 Vin. Abr.
230, 240.
3 Bac. Abr. 57.
Roll. Abr. 921.
Shep. Touch.
496.

(1) He hath a constructive possession from the testator's death, the probate is only evidence of that right. *Smith v. Nilles*, 1 Term R. 480. And may maintain trover for them in his own name. 3 Bac. Abr. 58; 6 Mod. 181; Cro. Eliz. 377; 4 T. R. 463; (*sed vid. ibid.* 277;) 7 T. R. 358; and see stat. 4 Ed. 3, c. 7, which statute is equally extended to administrators. Cro. Eliz. 384.—(E.)

of money, jewels, and goods, by servants and others about the testator, or where these things be. I think, therefore, that if without any fraud, collusion, or voluntary conniving on the part of the executors, they be prevented by others of laying hold on the testator's goods, so as that they may dispose of them, especially if it cannot be known by whom they are so purloined and embezzled, or if they be persons fled or insolvent; that then they shall not stand upon their score, as goods come to their hands, in respect whereof creditors or legatees shall draw so much from them, even out of their own goods, as in other cases where they have no such excuse.

And of this mind I the rather am, because I find the whole realm in parliament taking notice of such prevention of executors coming to the goods of their testator, by the wrongful act and embezzlement of others, without any default in themselves. And in this case the Parliament hath given special remedy, *viz.* that writs shall be directed to sheriffs, to make open proclamation for the appearance of the parties delinquent in the King's Bench at the day limited; and in default thereof they shall be attainted there of felony, the writ being returned, executed, *viz.* proclamation made. But note, that this proclamation is to be made two market days, within twelve days next after the delivery of the writ, and the last proclamation must be fifteen days before the day of appearance. And these proclamations must be made in such cities, (boroughs, or places, saith the

15 H. 6, c. 1.
33 H. 6, c. 1.

statute,) not expressing what is meant by the word such, and therefore meaning, doubtless, those in which the act of offence is committed. So that if the fact be not committed within the limits of some city, borough, or market town, no remedy is to be had by the statute; for that the proclamation is to be made upon market days, in the place where, &c. Now besides, other places, even some boroughs, viz. towns sending burgesses to the Parliament, have no market, and so are no places within the act. Also two executors must require this writ; therefore where there is but one executor, no relief is given by this law, for it is penal, making it felony, and therefore shall not be extended by equity beyond the words. Lastly, it extends but to the executors of lords, and persons of good degree, and only to the trespassing servants of such persons, not to other strangers, purloining the goods. But now who shall be said to be persons of good degree, not being lords, I will not much labour to decide; the rather, because I have not heard, nor read, to my remembrance, of any action brought upon this statute: but I think that good degree, must stay either at a knight, being the lowest dignity, or at a gentleman, being a degree of worship, as elsewhere is showed, and not stoop any lower.

And the said statute seems in some sort, to imply an opinion this way which I incline to, in that it expreseth his purloining to be an impediment of the execution of the will, whereas if the executors shall answer and make good to creditors

and legatees out of their own estate and goods, for these embezzled, the execution of the will is not hindered, but the executors are damnified in their own private value. Yet it may be said, on the other side, that some things given in specie by the will, such a piece of plate, such a furniture of a bed or chamber, such a jewel, may be purloined, so that the legatees can never have them, and, consequently, the execution of the will be hindered, though some recompence be made by the executors: but how these legatees shall recover recompence in such cases, for that legacies are not to be recovered by suit at the common law, I must leave to the professors of the common or civil law to inform. But if the executor be of secret assent to this embezzlement, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the embezzlers be, is a shrewd evidence, or proof; then shall the executor be adjudged an haver of them, and so stand charged as having them: for *pro possessore habetur qui dolo debet possidere* (1). And if in any case the taker by prevention from the executor, before his knowledge (perhaps) of the testator's death, or at least before his possibility of repair to the place where the goods were, to put them in sure custody; if, I say, such actor keep these goods from falling

(1) So if he hath made a fraudulent gift of assets, they shall still render him liable to that intent. Cro. Eliz. 405; 3 Bac. Abr. 58.—(E.)

upon the shoulders of the executor, they shall surely fall upon himself, and make him chargeable at the creditor's suit, as an executor of his own wrong.

Of goods lost by, or gotten from, Executors.

a. 56.

BUT put we the case (for thereunto shall be our next step) that goods come fully into executors' possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their own estates for them (a)? Surely hereabout two distinctions must be made, as I take it.

33 H. 6, 1.
10 E. 4, 2, 3.
7 Eliz. Dy. 241.

The first whereof I derive from our learning touching escapes of persons taken in execution and imprisoned; if such be rescued by alien enemies, the sheriff or gaoler shall not answer out of his own goods for this debt; otherwise, if it be done by subjects, against whom remedy is to be had by the court of justice: and so should I think it to be touching executors, viz. that if enemies landing (as near the sea-coast may easily and often happen), shall take away cattle or goods from an executor, hereby he shall be excused; contrariwise ordinarily, if the ereption or direption be by subjects known, and thereby actionable. Another difference I shall think may probably be

(a) Goods taken out of the possession of an executor after he hath administered, are assets in his hands. 5 Rep. 34; *Read's Case*, 11 Vin. Abr. 230.

taken from the rules of our learning touching bailment. If *A.* deliver goods to *B.* to keep as his own, or generally, viz. without any special undertaking by *B.* to keep them safely, and without any money or other valuable consideration given for the safe custody: here, if *B.* be robbed of them, he shall not make satisfaction to *A.* for them: and so if they be stolen from a servant or factor. But if they be taken away by a known trespasser, not feloniously, some opinion hath been that the keeper shall make recompence, because he hath remedy for recompence or satisfaction from the trespasser. Yet of this latter I should doubt, because *A.* himself, as well as *B.* may have this action for damages against the trespasser. Now an executor is of the nature of such an one, having the custody of another man's goods; and I have seen in a manuscript entire, the writ of trespass by the executor, expressing goods of the testator in the custody of the executor to be taken from him: therefore methinks he should no otherwise be charged than *B.* to whom goods were, as above is said, delivered to be kept. For the executor haply shall have no benefit nor advantage by the executorship, all the goods not sufficing, perhaps, to pay debts and legacies, which is the state we most think of, viz. where goods want to pay debts and legacies; for where there wants not, the question needs not be made. Yet a servant or factor, who hath wages for his service, is not thereby made liable to satisfy for things in his custody stolen, because he hath not for this par-

Vide 29 Ass. p. 28, 8 E. 2, Fitz. Detin. 59. 9 E. f. 90. 13 H. 7, 4. Co. lib. 4, f. 83, 84.

In custodia sua existit.
It is so in F. N. B. Eng. p. 193.

particular custody any compensation. So of an executor, if perhaps benefit might accrue to him by the executorship, as haply the discharge of a debt owing by himself, &c. Other cases there be wherein the executor will stand more clearly discharged. As if the testator left a lease for years of an estate by extent, wardship, or other goods, whereof he hath but a defeasible title, and they be evicted after his death : so if he left a ship at the sea with much goods and merchandizes, which are drowned in the return, never arriving in safety so also if he left a flock of sheep tainted with the rot, which die shortly after him : in none of these three cases (doubtless) shall the loss fall upon the executor. But to put a case of more doubt : what if a lease for years come to an executor subject to a condition for payment of rent, or a sum in gross, and the executor fails in payment, whether shall this loss fall upon the executor to be made good to creditors or legatees out of his own substance or not ?

Yet Quære.

To this, I must answer by this distinction, viz. If the executor had taken the profit of this land so long as to furnish him with money for the payment ; or if he had other goods of his testator in his hand to supply the payment ; then it is his default that the money is not paid, and he must bear the smart thereof, otherwise not ; for he is not bound to make payment out of his own goods : yet he is a sullen and unkind executor who will not so do, when as he may repay and satisfy himself by the profits thereof after. Lik

law, if the executor suffer a bond of a hundred pounds to be forfeit for not paying of fifty pounds, having sufficient in his hands. So also of a recognizance, statute or judgment, defeasanced upon payment of a less sum. Yea, I less doubt of all these cases, than of the forfeiture of the lease for years : for happily the executor had time to have sold the lease, and made money thereof towards the payment of debts ; the omission and neglect whereof may be imputed unto him, as a default justly occasioning recompense to be by the law required from him. But perhaps, he may excuse himself that he could not find a chapman who would give him to the value thereof. Hereunto yet reason can easily reply, that it had been much better to have sold it under the value, than to have lost the whole value, by exposing or abandoning it to a total forfeiture.

CHAP. XI.

HOW FAR AND WHERE AN EXECUTOR, HAVING ASSETS, IS CHARGEABLE OR LIABLE TO AN ACTION.

HAVING considered what things shall come to executors, and be assets in their hands for the performance of the will ; let us now consider what things the executor is bound to pay, satisfy, or perform, and where not ; where he is charge-

able, and where not ; this being admitted, that he hath assets, viz. sufficient wherewith to perform,

Here we will consider of these parts.

1. *Of debts by specialty or record.*
2. *Of debts or duties by contract without specialty.*
3. *Debts without either contract or specialty.*
4. *Covenant by deed or specialty.*
5. *Wrongs done by the testators.*

22 E. 4, 22.

TOUCHING debts by specialty, which are the most usual and common obligements, it will not be impertinent to give a little light touching the validity of a specialty, and the extent of it to executors. The most doubt will arise upon bills and such writings obligatory made, not by scribes or clerks in common form, but by others otherwise, for haste, or through simplicity. Thus long since we find a writing made by *A.* to *B.* *memorandum*, that I have received of *B.* ten pounds, which I promise to pay, &c. This being sealed and delivered, was held a good obligation by *Brian and Catesby*. So if the words had been only, I shall pay to *B.* ten pounds ; whether such words, or the like, as covenant or grant to pay, be in the form of a bill or bond, or in an indenture or articles, it is a sufficient ground for an action of debt. And though it should be miswritten, *wigint* for *vigint*, or *fitten* for *fifteen* ; yet shall it be favourably construed, and held a good specialty of debt, as hath been resolved in these and like cases ; and so also notwithstanding false Latin in

19 R. 2, F. Det.
166.
9 H. 6, 7.
2 H. 4, 8.
22 El. M. 5.
9 H. 7, 16.
2 H. 4, 8.
28 H. 6.

obligation, or the plural number for the singular number, or words of repugnancy or nonse; yet if there be words whereby it appears that *A.* is a debtor to *B.* and it be sealed and decreed, it is a good writing obligatory; yea, though it want the words of conclusion, *viz. In witness whereof*; as the Lord Dyer reports to have been resolved; although the contrary were decided in four several kings times before, as our books show.

Dyer 22.
28 H. 8.
Dy. 19 & 22.
40 E. 3, 1.
7 H. 7, 14.
8 H. 8, 36.
22 H. 6, 15.
21 E. 4, 81.
3 H. 4, 17.
11 H. 4, 76.

Now any such writing obligatory doth define or drown any duty by contract, because specialty is of a higher nature. So as if *A.* and *C.* do bargain with *C.* to pay him a hundred pounds for corn or other thing, and after *C.* take such writing obligatory as aforesaid of *A.* by this *B.* is discharged of the debt, because he stood charged only by the contract which is inguished by the specialty.

As for the extent and operation of these specialties to and upon executors, we must know that an executor doth so represent the person of the testator, and is so included in him, as that every bond or covenant by the testator, made for payment of money or the like, reacheth to the executor, although he be not named, *viz.* that he is not covenant for nor bind him and his executors by express words (*a*); and yet the heir

So reservation
of rent, grant of
annuity.
28 H. 8.
Dy. 14 & 22.
47 E. 3, 22.
32 H. 6, 32.
10 H. 7, 28.

(a) The executors do more actually represent the person of the testator than the heir doth the ancestor; for if a man dieth himself, his executors are bound, though they be not

not named is not bound, though there be never so great assets or land descend unto him.

No mention of executor in the judgment, yet he charged.

9 H. 6, f. 11.
11 H. 4, 6. 92.
Otherwise of a guardian in so-
cage, he is out
of the stat.
W. 2, c. 11, ut
credo.
Co. l. 10, 103.

Now touching debts upon record much need not to be said (except of those by stat. merchant); for to debts and damages already recovered against the testator, and to debts by recognizances, the executor's liableness is somewhat clear and conspicuous. Yet other inferior debts upon record may fitly be thought of as issues forfeited, fines imposed by justices at Westm. or at assizes, quarter-sessions, commissions of sewers or bankrupts, by stewards in leets, or the like; for all these are debts of record, which executors stand charged withal (1). So also if the testator were before auditors found in arrearages of account, being a bailiff or receiver; for these auditors are by statute judges of record: but if the account were made only before the party to whom the arrearages pertained, or but before one auditor only, it is out of the statute, which speaks of ac-

named; but so it is not of the heir; and so of administrators, and ordinary also. 1 Inst. 209, a.

And though the executor be not named, yet the law appoints him to receive money due or owing to the testator: but so doth not the law appoint the heir to receive the money unless he be named. 1 Inst. 210, a; 209, b.

The heir being forced to pay the debt of his ancestor on bond, shall be reimbursed by the executors as far as there is personal assets. Ca. in Ch. 74, *Armitage v. Metcalf*; 1 Ch. Ca. 74; Pass. 18 Car. 2; 2 Ch. Ca. 5.—(C.)

(1) 11 Vin. Abr. 278; 2 Vern. 750; S. C. 1 P. Wms. 334.—(E.)

s before auditors in the plural number (*a*);
 ore the executor not chargeable, because

by the common law executors could not have an action
 in respect of the privity of the account. But
Vestm. 2, c. 23, giveth an action of account to ex-
 ; stat 25 Ed. 3, c. 5, to executors of executors; and
 1 Ed. 3, c. 11, to administrators. Executors of the
 tant chargeable to the King by his prerogative in
 of account; but it is otherwise in the case of a
 n person, 11 Rep. *Earl of Devonshire's Case*.

executor is not chargeable in an account where he
 be charged in detinue; for that nothing came to his
 nor in account, where the testator was not bound to
 account, although to the King. 11 Rep. *Earl of*
hire's Case.

Vestm. 2, c. 23; 13 Ed. 1, executors shall have a writ
 ant, and like action and process in the same writ as
 tator should if he had lived. By 25 Ed. 3, stat. 5,
 ora of executors shall have actions of debt, account,
 goods carried away of the first testator's, and execu-
 statutes-merchant, and recognizance, made unto him,
 e shall answer to others so far as they shall recover of
 t testator's goods, as the first executors should have

By 31 Ed. 3, c. 11, administrators to have an action
 and and recover, &c.; and shall answer to others,
 the same manner as executors, &c.

th been attempted in parliament to give an action of
 t against the executors of a guardian in socage, but
 ould be effected. 1 Inst. 90, B.

egard of the length of time, and the loss of books
 the defendant had sworn by his answer), it was
 d, the defendant should not be charged in the account
 re than according to his own oath what was made, or
 remember or believe was made, by sale of those goods:
 accountant having lost his papers by no fault of his
 hall not be charged beyond his own oath. Yet a sur-
 factor was to account for what was made by himself or

testator might wage his law in those cases, not in the former.

See *S. P. Godfrey v. Saunders*, Easter, 10 G. 3. 3 *Wilson in C. B.* co-factor; and in some case an account lies against the executrix for the deceased factor. *Ca. in Ch. 127, 128, Holstcom v. Rivers.*

In the case, *Stowel v. Long*, executor to George Long, the lord keeper declared, that if the defendant's counsel had not offered to account he would not have ordered the defendant to account; for that all the money received by the profits was pardoned by the act of oblivion. *Ca. in Ch. 173, Stowel v. Long.*

Plea of account stated, overruled, although the defendant was but an executor, and pleaded, that he knew not how to account; but this was upon full proof that 200*l.* was omitted in the account, being paid by his servant, and entered in his book, which he then had not. 27 *Car. 2; Wright and Comp.* 1 *Ch. Ca. 262; Nel. Ch. Rep. 431, S. P.; 2 Ch. Ca. 157, S. P.*

Account lies not against executors or administrators, because they are not privy to the accounts; and a detinue lieth not for money numbered, because one penny may not be known from another; and the testator might not wage his law against a bill, being sealed and delivered as a deed.

It is clear law, that no action of account lieth against an executor or administrator, for the law doth not intend them to be privies to the account.

Account lay not against executors for three causes. First, for want of privity, and for that he never was in possession of the land, nor took any profits of it, &c. *Dyer, f. 277, pl. 59.*

By 4 & 5 *Ann. c. 16*, actions of account may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one joint-tenant and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than his share, and against their executors and administrators; but generally matters of account are most proper in equity.—(C.)

And whereas exception was before made of a debt by statute-merchant, it was by reason that as Lord Brook tells us, that if the conusor in any case be returned dead, no remedy appeareth for the conusee to have execution of the goods of the conusor, but only of his lands. If this should be thus, it were a very mischievous case: for many bound in statutes have no lands, but uses, and goods of great value, and if by their death their goods and chattels should be set free from this statute, and the creditor without remedy, the law were defective: and it were so much the more strange in this case, because the statutes of Burnell and Mercatoribus seem to pitch principally upon goods, and to tend unto assurance between merchants, who usually are not landed men. But that the law doth give remedy in such case, as well against the goods as lands of the deceased conusor, appears by the resolution lately made in what order and precedence statutes are to be satisfied by executors, as after we shall see.

36 H. 8, Br.
Stat. Mer. 43.

Acton.

*Of Debts by Contract without Deed, as Leases,
Parol, &c.*

CONTRACTS are of divers kinds; and we will begin with those in the realty as most worthy. If therefore one be lessee for years or for life, without any indenture or deed (as he may be), and his rent being behind, he dieth; now is the executor liable to the payment of this rent without

21 H. 6, 1.
44 E. 3, 42.
44 E. 3, 5.
7 E. 3, 11.

14 H. 7, 4, per
Keble. Vide
8 E. Dy. 247.

M. 22 & 33 E.
in Com. Ban.

Dr. & Stud. 121.
Com. Dig. Adm.
B. 4. 10.
1 Ventr. 271.
1 Salk. 297.
1 Sir. 266.
Lev. 127.

any specialty (a), for that his testator, if he had been sued in his lifetime, could not have waived his law. But if the lessee for years in his lifetime sell or grant away his term or lease, although he still lie at the stake for the rent to grow due after, until the lessor accept the assignee for his tenant; yet if the lessee die, his executor shall not be charged for any rent due after the death of his testator. But what if the lessee do not alien or assign his term, but die thereof possessed, and the executor, perceiving the land not to be worth the rent, waiveth the same, yet the lessor will not enter thereinto, nor intermeddle therewith, whether may he yet charge the executor with the rent during the term? I answer, that if he hath assets, that is sufficient for payment of this and other debts, he cannot waive this lease; but shall be tied to answer this rent, though much more than the land is worth, for the taking of the lease is much of the nature of an obligation to pay money: yet because it is yearly executory, the executor may waive it, in case his testator's

(a) But in debt for rent, and the action laid in London, supposing the lease to be made there of lands in Oxfordshire, and that lessee entered and died, and the defendant entered as executor, and brought the action in the debt and detain; and upon demurrer upon the declaration, judgment against the plaintiff: for although that the defendant is sued as executor, he is charged as assignee in the debt and detain upon the privity of the estate, not upon the privity of contract; and the action ought to be brought where the land lieth. Lev. 2, p. 80, *Cornel v. Lisset*.—(C.)

will not supply and bear that loss. But if there be assets to bear this yearly loss for years, but not during the whole term? I in this case the executor must pay the rent as these assets will hold out, and then waive the possession, giving notice to the sioner. And this I think he may do well gh, notwithstanding his occupation of the divers years after the testator's death, be- that was not voluntary, but as of necessity : his I leave as a *quære*, to be well advised of good counsel.

Of Contracts Personal.

HERE the testator might wage his law, there ction lieth not against the executor, as hath touched (a): therefore he is not chargeable action of debt upon a simple contract, as by n of this or that, to his testator; yet, though re the inheritance of land which was sold, so a sale were without deed, or though by deed,

41 E. 3, 13.
15 E. 4, 25.
Except by a quo
minus in the
Exchequer. So

Debt lies not against an administrator upon an arbit made between the plaintiff and the intestate in ; because the intestate might have waged his law. 10 El.; *Bowyer v. Garland*, Cro. El. 600.

an action against executors upon assumpsit of the t, the plaintiff need not aver, that the defendant hath to pay legacies or debts, for that shall come on the ant's part; for the law intendeth that every one will in rge of his conscience leave assets to pay all his debts, he ought to pay to any one. 9 Rep. 87—90, *Pinchon's* (C.)

the King's debt.
Co. l. 9, f. 98, a.
So of accounts,
except for the
King. M. 32 &
El. in Com.
Ba. by three
judges, and 37
El. by all, as I
find in my re-
port.
But Co. l. 5, f.
82, b. it is con-
trarily reported.
3 El. Dy. 196.
Demurrer.
9 E. 4, 51.
10 H. 7, 8.
15 E. 4, 16.
22 H. 6, 18.
19 H. 6, 116.
There though a
common hostler
or victualler
trust his guest,
he loseth his
debt by his
death.
Co. 9, 87, b.
12 H. 4, 23.
But if the sum
be also written
on it, they are
bound as by a
deed. 20 H. 8.
Dy. 9, a. Slade's
Case.
Co. lib. 4.
Co. lib. 9, 17.
Pinchon's Case.

yet if no counterpart were under the hand of him to whom the sale was made. And the custom of London to the contrary, viz. that an action of debt should be maintained against executors upon a contract, was held void, at least no good plea against other creditors, that such a debt was recovered against the executor, or paid by him; as was towards the later end of the late Queen's time resolved, though in the beginning of her time it was a demurrer. Yea, though such a debt grew for the most necessary thing, viz. meat and drink, which bindeth even an infant to payment, yet will it not charge the executor of a man of full age. But this is meant where the contract was only by word: for where the testator putteth his seal to any deed or writing made upon such sale, this is more than a simple contract, and taketh from the vendee his wager of law, and so chargeth the executor. But if the testator seal but unto a tail or tally with scotches, expressing a debt, this is no such specialty as shall charge executors. Yet in some cases without any seal at all the executor is chargeable. But although no action of debt lieth against the executor upon such a simple contract, yet may the creditor in that case maintain an action upon the case, grounded upon the assumption implied (a), though not expressed, as now standeth resolved by all

(a) By assumpsit of the testator to pay a debt, or duty, an action upon the case lieth against the executors. 10 Rep. 77, *Lovies's Case*.—(C.)

the judges of all the courts at Westminster, though heretofore there hath been much difference of opinion thereabout. And indeed, thus the executor is charged in matter for a simple contract, though not in manner of a debt, but as for breach of promise, making recompense in damages, instead of the debt (a). And the chief reason for it is, because the testator could not have waged his law in this action upon the case against himself, though in debt he might. Where the testator retaineth servants in husbandry, or otherwise, and dieth, there being wages due to these so retained; the executor is liable to an action of debt for the same, by reason that the parties were compellable by statute thus to serve, and therefore the testator could not have waged his law: but in case of servants not compellable, as waiters or serving-men as we call them, no action of debt lieth against the executor for their wages, though against the testator himself it doth; for the contract is sufficient to charge him who made it. See of *Account*, after.

2 H. 4. 14.

4 H. 6. 4. 8.

So 2 H. 4. c. 14.
Servants in the
war by contract.

(a) But a man may not sue an executor and another jointly; for the one is to be charged *de bonis testatoris*, the other *de bonis propriis*. And judgment was given for the plaintiff. Lev. 2, p. 228, *Hall, &c. v. Huffum*.—(C.)

Where Executors shall be charged, without either Contract or Specialty.

27 H. 6, 4.
15 E. 4, 16.
Co. lib. 9, f. 87,
b.
No. Na. Br.
131, a.
He must have a
liberate also.

WHERE a prisoner oweth money to a gaoler or keeper of a prison for his diet or victuals, and dieth; his executors shall be chargeable for the debt, because it is for the commonwealth to have prisoners kept, which cannot be without affording them victuals (a). Also where one hath a patent or tally of the Exchequer, to receive money of some customer, receiver, or other officer of the Crown, and delivereth it to him, he then having money of the King's in his hands: if he pay not the same, but die, his executor shall stand chargeable with the payment thereof. So for arrearages of account before auditors, if more than one, but this is debt of record in law.

27 H. 6, 4, b.
1 H. 7, 17.
2 H. 7, 3, b.
Clerk of the
Chancery.
10 H. 6, 24, 25.
No. Na. Br. 82,
83.
West. 1, a. 35.
Lib. Intr. 173, b.

So if any lord of free tenants doth levy aid of them for the marriage of his eldest daughter, and he died before she be married, she may recover

(a) But the Lieutenant of the Tower may bring his action against the executors of a prisoner for treason dying there for the meat and drink provided for such prisoner. The like of any other gaoler; for the gaoler is bound to find meat and drink for his prisoner, and in such case the prisoner cannot wage his law. Co. Litt. 295, a; Poph. 127.

The like difference is between a labourer, and limner or books; for the labourer is compellable to serve, but the limner not; and therefore it was his fault he did not take specialty upon his agreement. Coke's 9 Rep. 88, *Pinchon Case*. But actions upon the case *sur assumpsit* do well lie against executors. *Ibid.* 90.—(C.)

this money by an action of debt against his executor: but this is by virtue of a statute. There is a precedent, in the book of entries, of an action of debt against the executor of an heir, by which it seems that a man binding himself and his heirs, and leaving assets, the heir taking the profit becomes so a debtor, that his executor shall be charged. And in the *Register* there is a writ against the executors of the guardian of the spiritualities of the Archbishop of York, for the debt of *B.* who died intestate, and whose goods came to the hand of the said guardian, viz. the Dean of York. In allowance whereof, there is a note added of the like writ, brought in King Richard the Second, his time, and that then a precedent was alleged of such a writ in King Edward the Second, his time, against the executors of an ordinary, and that they were enforced to answer unto it. So is the opinion of Trew, in the time of Edward the Third. But Ald. opposeth him. Also, the *rationabili parte bonorum*, by custom, in some places is maintainable for the wife and children against the executor. But no action of account lieth against executors, except for the King. More hereof, tit. *Wrong*.

Reg.orig. p 141.
Cest brief fuist.
en Court Anno
11 R. 2, oufuist
dit que termine
Trin. 16 Patria.
Ed. tertii avi.
Reg. nunc.
mesme cestui
Robert de P.
fuist reponder
au tial chief de
il. parais vero
executors de
ordinary.
11 R. 2.
16 P. 2.
11 E. 4.
Fitz. Ex 77.
See Co.Lib.Intr.
564. Such
actions in York-
shire.

Of Covenant charging Executors.

WE have already touched upon covenants, in part, viz. where they be expressly for payment of money, showing them to be in law, bonds, that is, writings obligatory, whereupon an action of

Inter Andrews
and Elserig,
circiter 33 El.

Pasch. 33 El.
inter Bor. &
Austine, in
Com.Ba. Quere
If both be to be
done by the co-
venantor, viz.
10 l. If not five,
such a day. So
in Fenot's Case.
But where the
lessor did cove-
nant to pay the
quit-rent, divers
justices thought
the executor not
named was not
bound, 1 & 2 P.
& M. Dy. 114.
Note, the case is
supra in marg.
Pasch. 38 El. in
Ban. Reg.

debt may be brought as well as an action of covenant, though the words of the deed bear the sound and phrase of a covenant. Yet in some cases no action of debt lieth upon a covenant to pay money: as if *A.* covenant that his executor shall within a year, or such a time, after his death pay ten pounds to *B.*; now for that no action of debt was maintainable against *A.* himself, it lieth not against his executor, but only an action of covenant, as was held in the late Queen's time. So if the covenant be conditional, as thus; that that if *C.* do not pay to *B.* ten pounds, then *A.* will pay it: and so also, perhaps, if the covenant be in the disjunctive, viz. to do such an act, or to pay ten pounds: now if the act be not done, yet no action of debt lieth for the money, but only an action of covenant. But now let us come to the cases of mere covenants, and see which of them will charge an executor, and which not. If a lessee for years covenants to repair the buildings, or to pay the quit-rents issuing out of the land let, there is little doubt but the executor, to whom the term cometh, must as well as his testator perform that covenant, although he did not covenant for him and his executors. And yet of these cases doubt hath been: and touching the latter, viz. of paying quit-rents, divers justices in Queen Mary's time were of opinion, that it was a thing so personal, that it died with the person, and did not charge the executors; nor is there any contrary opinion expressed in the book. And since that time, viz. towards the end

Queen Elizabeth's reign, in the action of covenant between the Dean and Canons of Windsor Hide, touching reparations, at the first mention was, that only the person covenanting was tied to this performance; but after it was resolved, that that covenant did run with the land, and so both executor and assignee were bound to performance. But in that case it was resolved by Popham, chief justice, that if the covenant had been to do a collateral act, neither the executor nor the assignee had been tied thereby: therefore where a lessee for years covenants in such a time to build a new house upon land, and dies before that time expired, I doubt whether the executor be bound to perform or not, although it do concern the land let, and perhaps the rent or fine was the less, in respect of this charge of new structure or building; which is a great reason that the executor, though not named, should be tied to the performance. But if the covenant had been to build a house elsewhere than upon the land let, or to do any other collateral thing, not pertinent to the land let, it is clear the executors were not bound to perform it. And yet, in those cases, if there be a breach or non-performance in the testator's time, as that the time of performance were fixed before his death, then it is clear the executors were bound to yield recompense by way of damages, recoverable in an action of covenant, both Shelly and Fitzherbert agreed: and so did the Lord Popham agree, in the said case

Co. 1. 5, f. 24.

Resolved P. 39
 Eliz. but not
 adjudged till M.
 43 & 44 Eliz.

Tr. 28 H. 8.
 Dyer 14.

There was a house to be built upon the land leased; and yet Baldus seemed of a contrary opinion.

M. 8 & 9 El.
Dy. 257. Intrat.
M. 7 & 8 Eliz.
Swanpu v.
Strangsham &
Searles.

Tr. 22 Eliz.
Rot. 459, inter
Broderidge and
Windsor.

of *Hide*, as I find in my own report of that case though in the Lord Coke, reporting only the point in question, that be not mentioned. Now let us consider of the case where there is no express covenant at all, so much as for the lessor himself but only a covenant implied, or covenant in law as we call it. As if lessee for life make a lease for years, and die within the term, so as the lessee is evicted by him in reversion and remainder. In this case it was resolved, in the late Queen's time by three judges, *viz.* Walsh, Brown, and Dyer that by this covenant in law the executors were not chargeable; and in the same case, the Lord Dyer sets down another resolution to the same effect. But Master Sergeant Bendloes, reporting this later case to be of a lease made by tenant in tail (a), *viz.* before the statute of 32 Henry. 8, not warrantable by it, sets down the opinion arbitrarily, *viz.* that the action was maintained against the executors. This may serve for instance, the like being in any other case where the lessor hath not a good and a firm title, but is perhaps subject to a condition, or other eviction, as the lessee cannot enjoy the land according to his lease.

But this must be so understood, that no eviction or breach of covenant is in the life of the tenant

(a) By 32 H. 8, 28, tenant in tail may by lease for two or three years, or three lives, bind the issues in tail, but not in reversion or remainder; but several things are to be observed in making the lease.—(C.)

himself; for if that be, there is no question but the executor stands chargeable: and therefore if one make a lease of land by deed wherein he hath nothing, this covenant is perhaps presently broken; and though the lessor die before an action of covenant brought, it will be maintainable against his executor, though no express covenant: This is useful to be known, though in these days there be few leases so made, without express covenant, and the executors also named. And where there is a special covenant in express words, it doth qualify the covenant implied: so although words of demise and grant tie the lessor to a general warranty of the title against all men, yet it being after covenanted that the lessee shall enjoy against the lessor and his heirs, or against all claiming under him or his ancestors (a); now no eviction by or under any other title giveth cause of action, or bindeth the lessor or his executor to make recompense.

Nokes and
Ander's Case.

Trin. 41 El be-
tween Nokes &
James 4 Co. 80.
5 Co. 17.

*Of Wrongs done by Testators, and whether
Executors be liable to Amends.*

ALTHOUGH executors do represent the persons of their testators, yet, if the testator commit any

But in equity
the executor of
an executor is

(a) An express warranty cannot be created by will; for a will in writing is no deed. But if a man devise lands for life, or in tail, reserving a rent, the devisee shall take advantage of this warranty in law, albeit the ancestor was not bounden.
1 Inst. 386, a.—(C.)

liable for any waste or wrong done by his executor, though not at law a personal tort which dies with the executor.
 2 Ch. Ca. 217.
 41 Ass. p. 15.
 40 E. 3.
 Fitz. Ex. 74.
 Co. l. 9, f. 78, a.

trespass upon the goods of another, or upon his person or lands, no action lieth for this against the executor; for *actio personalis moritur cum persona* (a). So if a sheriff, gaoler, or keeper of prison suffer one in execution for debt or damages to escape (b), though hereby the party at whose suit the execution was be entitled to an action, viz. an action upon the case against such officer by the common law, and by statute an action of debt; yet if he so suffering die, for that such sufferance was a wrong of the nature of a trespass, no action lieth against his executor for the same. And upon the same reason, as I presume, if one carry away his corn and hay, without setting out the tenth, although the treble value (c) be recoverable against him in an action of debt, yet, if he die before such recovery, the action is gone, and lieth not against his executor; no, not al-

(a) But if any person by recommending an officer to the King, or otherwise, be a means or instrument of loss or damage to the King, he, his heirs, executors, and administrators, shall be chargeable to the King for such damage sustained. 11 Rep. 91, 92, *Earl of Devonshire's Case*.—(C.)

(b) Upon an escape, debt lies not against the heir nor executors: for it is a trespass, *quæ moritur cum persona*. Dyer, 271 and 322; 2 Bac. Abr. 245; Show. 176; 2 Mol. 145.

Action for an escape lieth not against the gaoler's executors, because it is a trespass. 2 Inst. 382.

The heir or executors, according to the case, shall have a writ of error upon a bill of exception. 2 Inst. 427.

(c) This treble value is by 2 & 3 Ed. 6, c. 13.—(C.)

though the testator were a lessee for years, so as his estate come to his executor.

Like law in other penal statutes: as, for arresting one at the suit of *J. S.* without his privity or assent (*a*); or for not appearing as a witness, being served with a subpoena, and having charges tendered, and many like. Yea, if a lessee for years commit waste and die, no action lieth against the executor for this waste; for all these cases are within the rule of *actio personalis moritur cum persona*: and many other like cases might be put, but these may suffice. Yet if a parson, vicar, or other spiritual or ecclesiastical person do suffer a ruin or decay of the houses or buildings upon his such spiritual benefice or promotion, and dieth, his executors are liable, by the spiritual or ecclesiastical law, to the repairing of such spoil or decay. And because some use fraudulently to grant away their goods, so as nothing shall be left to their executors, it was enacted, *temp.* Elizabeth, that such grantees of goods should be liable to the successor's suit for these dilapidations, as if they were executors. 13 El. c. 16.

As for one other case of this nature, *viz.* where an executor wasteth the goods of his testator, or an administrator the goods of his intestate, and dieth, whether his executor be subject to an

The executor of an executor who commits a devastavit, liable in equity. Chan. Ca. 303.

(a) The penalty for not appearing is by 5 El. c. 9, 10*l.* and much farther recompense, &c. For cases on this statute, see Str. 519; 2 Stra. 810; 2 Ld. Raym. 1528; Barnard, 93; B. 45; 2 Stra. 1150.—(C.)

action for this or not, I adjourn the reader that place where I shall treat of such wasting devastation by executors.

Fms. Ex. 77.
I conceive no
difference be-
tween this and
the other cases
supra.

Unto this head not unfitly may be referred what before is said of actions against the executors of the debtor's heir, and the executor the ordinary; for the specialty binding to payment reacheth not to any of these: but because their testators should have paid these debts with the goods or profits of the lands of the debtor and did not, but retained them to themselves therefore for this, as a wrong, are they suable, I take it. So also, by the same reason, are the executors of an administrator chargeable, when he did neither pay the debts, nor leave the goods to the next administrator, but otherwise disposed of them. Yet an executor is not chargeable in an action of detinue, nor of account (a) (except the King), for the testator's detaining, and in paying or answering things received, or under his charge.

2 H. 4, 13.
He may by A.
admit.
Co. l. 11, f. 88.
H. 6, 35. a.
Con. for ar-

And the reason why, after account made before auditors, and the bailiff or receiver be found arrearages and die, that in this case his execu-

(a) Action of account lieth for, but not against executor. F. N. B. 257, English.

Action of account lies not against executors, but only the King. 1 Inst. 90, b.; 11 Rep. *Earl of Devonshire Case*.

Where by statutes action of account lieth for executor administrators, and executors of executors, *vide* 2 Inst. and *supra* 241.—(C.)

is chargeable, is because the auditors are made judges by the statute Westm. 2, c. 11; so this arrearage, which they have judged, is a debt by record.

rearrages of an account before auditors.
11 H. 5, 64. 91.
92.
9 H. 6, 11.
13 E. 1.
Co. lib. 9, f. 87.
a.

But if the case be put on the other side, *viz.* that the bailiff or receiver have been found in surplusage upon his account, *viz.* that he hath laid out more in his lord's or master's business than his receipts amounted unto, and then his lord or master dieth, now shall not he have any action against the executors for the surplusage, because it is out of the purview of the said statute.

CHAP. XII.

OF THE ORDER AND METHOD TO BE USED BY EXECUTORS IN PAYMENT OF DEBTS AND LEGACIES, SO AS TO ESCAPE A DEVASTATION OR CHARGING OF THEIR OWN GOODS..

WE have gone through and dispatched the two first proposed parts, *viz.* First, touching the being of executors, and the manner of their being. Secondly, their having, and the manner of their having. We come now to the third part, *viz.* their doing or disposing of the testator's estate.

Now this consists principally in the issuing of money, though partly also in delivering or as-

sending to the execution of legacies, not being money, but other goods or chattels bequeathed.

Money is to be issued by executors four ways ordinarily.

About the funeral of the testator.

About proving his will,

In paying of debts.

In paying and satisfying of legacies peculiarly.

3 Inst. 202.

As for the first, burials be as of necessity in two respects (*a*), viz. First, of charity to the dead, that he may be christianly and seemly interred (1).

Secondly, to prevent and avoid annoyance to the living, who, by the very view of the dead carcass, would both be affrighted, and, within a few days, distasted at the nose. We know that under the law, the touching of a dead carcass made a man unclean, and to need purifying: no can we easily forget what the sisters of Lazarus said to our Saviour, touching their brother, when he had been dead three or four days, viz. that the taking of him then out of his grave must need bring a noisome savour. Hereabout, therefore

(*a*) Funeral expenses, according to the quality of the deceased, are to be allowed out of the goods, before any other debt or duty whatsoever; for that is *opus pium et charitativum*. Coke's 3 Inst. 202.—(C.)

(1) And this act, being so necessary and pious, shall be therefore constitute a stranger performing it an executor *son tort*. Swinb. 6, s. 22; 11 Vin. Abr. 207; No. 2; 4 Ver. jun. 216. But a direction to pay debts, funeral expenses and of proving the will, constitutes a sufficient appointment. 1 Hagg. Rep. 80.—(E.)

some experience is necessary, and that not only for fees to be paid, which in London amounts to a considerable sum, especially for such as are to be buried within the church, but also otherwise, viz. for the pall or hearse-cloth, the ringing (1); &c. As for feasting and banqueting, it seems not to be congruent to the sadness and dolefulness of the action in hand. But howsoever that be, yet where the testator leaves not sufficient goods to pay his debts, festival expense is to be forborne, except the executor will out of kindness bear it with his own purse; for dead debtors must not feast to make their living creditors fast (2). I mentioned a considerable amount of funeral fees payable in London (a); and surely (to let my thoughts fall back upon it a little) it is worth consideration, whether in that kind, and especially for those who dying there are yet carried into their countries to be buried, the exaction be not either unjust alto-

(a) It is no good custom in London, and against reason, that he that is not any parishioner, but passing through the parish, lies at an inn for a night, should be forced to be buried there, or to pay as if he had been buried there. Hob. Rep. 238, *Topsal and Ferrers*; Hob. f. 175; S. C. 1 Roll. Abr. 559, pl. 1, S. C.—(C.)

(1) In case of a defect of assets, no other expenses will be allowed, except for the coffin, shroud, tolling the bell, and the fees for the parson, clerk, sexton, and bearers; but not for pall or ornaments. 3 Baco. Abr. 85; 4 Burr. Eccl. L. 201; Salk. 296; 3 Atk. 249.—(E.)

(2) And he will be chargeable for this species of waste. Godolph. 2, c. 26, s. 2.—(E.)

gether, or, too onerously excessive: so, also, for much ringing, contrary to the canon made at the convocation in the first year of King James.

The next thing mentioned to justify and occasion expense is the proving of the will. But this way a greater disbursement (except for riding charges, or by reason of opposition by a *caval* put in, or the like,) will not stand allowable than is prescribed by the statute made in the time of Henry the Eighth, whereby the fees of ordinaries, and their scribes, registrars, and officers, be limited (1). And it is strange that these bounds have been transgressed, the rather for that long before, in the time of King Edward the Third, by an Act of Parliament, it is provided, that the King's justices should, as well at the King's suit as at the parties grieved, inquire after such oppressions or extortions, for so they be called: yea, St. Germaine, who was no stranger to the civil and canon law, as appears by his book, saith, that the ordinary ought to take nothing for the probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it.

21 H. 8, c. 5.

13 Ed. 3, c. 4.

Doct. & Stu.
l. 2, c. 10.

Vide Vern. 143.
Harding v.
Edge, and

Now we come to the third occasion of disbursement, viz. payment of debts, which is the

(1) The statutes 2 & 3 Ann. c. 4; 6 Ann. c. 35; 7 Ann. c. 20; and 8 Geo. 2, c. 6, require him also to enrol the memorial of any will relating to lands, &c. in York or Middlesex, except as therein excepted. Vide 2 Bl. Com. 34—(E.)

in part of our business. We have before seen that debts lie upon executors having assets to pay them; we are now to see in what order they must pay them, as well *ut sint fidi dispensatores*, for their own indemnity, *ne quid res sua capiat trimenti*. To put themselves into the better order or method of handling these things, we will put our debts into their several kinds, thus :

They are of these three sorts, *viz.* either

I. Debts of or upon record ; or,

II. Debts by specialty ; or,

III. Debts without specialty.

The debts upon record may be again divided into four sorts or kinds, *viz.*

I. Debts to the King or the Crown.

II. Debts by judgment or recovery in some court of record.

III. Debts of recognizance.

IV. Debts by statute-staple, or statute-merchant.

Among these, the debts of the Crown are to have the first place of precedence ; so as if there should not come to the executor goods of greater value than will suffice for the satisfaction of these, he is not to pay any debt to a subject ; and if he is sued for any such, he may plead in bar of this that his testator died thus much indebted to the King, showing how, &c. ; and that he hath goods surmounting the value of that debt (a).

2 Vern. 88.
Searle v. Lane,
in Mich. 1688.
Where it appears that a
decree of Chan.
is equal to a
judgment at
law. And tho'
an executor
cannot defend
himself at law,
by pleading he
has no assets
ultra to satisfy
the decree, yet
he may defend
himself by a bill
in that court.

M. 33 & 34.
Eliz. the Lady
Walsingham's
Case, in Com.
Ban. & Tr. 39
Eliz. 5 Bac.
Abr. 79. 11 Vin.
Abr. 295. Com.
Dig. Adm. c. 2.
Cro. El. 79.
Salk. 80.

(a) The King's debtor dying, the King shall be served by the executors. See *Magna Charta*, 9 H. 3 ; see 27 E. 3.

The executors or administrators are chargeable to the

Prerogative.

Lib. 1.

21 E. 4, 21, 22,
So must it be
pleaded M. 33
& 34 Eliz.

Or, if the subject's pursuit be not so by way of action as that the executor hath day in court to plead, but be by way of suing execution, as upon statute-merchant or staple, then is the executor put to his *audita querela*, wherein he must set forth this matter. And there is great reason why the King's debts should thus be preferred before any subject, *viz.* for that the treasure royal is not only for sustentation and maintaining of the King's household, but also for public services, as the wars, &c., as appears by the statute 10 Richard 2, c. 1; and therefore it is, as I conceive, that Bracton saith of the treasures or revenues royal, *roborant coronam*, they do strengthen or uphold the Crown. And for the like reason, as I think, did God enact, touching the possessions of the Crown, that if they were given to any other than the King's own children, they should revert and come back to the Crown the next jubilee, which was once in fifty years, *sed de hoc satis*. But this priority of payment of the King's debt before the debt of any subject, is to be understood only of debts by or upon record due to the King, and not of other debts. If any ask how the King should have any debts which shall not be of record, since by the statute 33 of King Henry 8, c. 30, it is enacted, that all obligations and specialties taken to the use of the King, shall be of

King's debt, if they have assets; the like of the heir, although not named in the recognizance, &c. Wing. Ab. tit. Court. —(C.)

same nature as a statute-staple, to this I add, that there may be sums of money due to the King upon wood sales, or sales of tin, or other his prerogatives, for which no specialty is given; so also amercements in his courts-baron, or courts of honour, which be not courts of record, the fines for copyhold estates there; so of the fees for which strays within the King's manors liberties are sold. Also, as the law hath lately been taken and ruled in the Exchequer, even debts by contract, due to any subject, are by his outlawry or attainder forfeitable to the Crown. Yet neither these, nor those due to such person outlawed or attainted, by bond, bill, or for arrearages rent upon lease, are or can be any debt of record, until office thereupon found; for although outlawry or attainder be upon record, yet if it not appear by any record, before office found, that any such debt was due to the person outlawed or attainted. Thus are not these debts due to the Crown to have priority of payment before the subject's debts, though the King's debts of record are so to have. So that if a subject to whom the testator was indebted by specialty sue for this debt, the executor must plead, that the testator died indebted thus much to the King by record, more than which he left not goods to satisfy, if the truth of the case be so; for if there be sufficient to satisfy both, then the subject creditor is not to stay for his debt till the King's debt be paid. And if the subject creditor sue executor upon a statute, so that the executor hath no

Debts by contract forfeitable by outlawry or attainder.

And must plead the record in certain, as was held in the case of the Lady Walsingham, M. 33 & 34 Eliz. But it sufficeth to say, by a record of the Exchequer, as was held Tr. 39 Eliz. in Ben.

Reg. 1 Salk. 80.
11 Vin. Abr.
291. 3 Bac.
Abr. 80.

day in court to plead this debt to the King, then is the executor put to an *audita querela*, wherein he must set forth the matter, and so provide for his own indemnity. But what shall we say of arrearages of rent due to the King? Surely, where it is a fee-farm rent, or other rent of inheritance, I see not how it can come under the title of debt, since for it no action of debt is maintainable so long as the estate continueth in him to whom it grew due; and I find that the Lord Dyer, M. 14 Eliz. said, that the King could but only distrain for his rents, and not otherwise levy them of lands and goods; and that the King by his prerogative may distrain in any other lands of his tenant, our books tell us, but no more. Yet I know it hath been otherwise done of late in the Exchequer, which if it have been the ancient and frequent use of the Exchequer, it will stand at law, though unknown to the Lord Dyer. Now rent upon a lease for years differeth from the other, since for the arrears thereof an action of debt lieth. But how can either of these be debts of record, when the non-payment may be either in the Court of Exchequer, or to the receiver-general or particular? And how, then, can there be any certain record of the nonpayment, so as to make any certain debt upon record? We know statutes have been made to make the lands of receivers subject to sale for satisfaction to the Crown; and besides that, some ancient patents direct the payment of fee-farms into the hands of sheriffs. The stat. of Westm. 1, c. 19, provides remedy for the

King against sheriffs not answering the debts of the Crown by them received, so as the King's farmer or debtor may have paid his rent or other debt, and the Crown have not yet received it. Of fines and amerciaments in the King's courts of record, there is no doubt but they are debts of record.

Come we now to the debts of subjects, and first those of record, touching which I shall not be able to hold so good a method, and so well to handle things by parts, as I would; for that the parts so stand in competition one with another for precedency, as that they must of necessity thereabout conflict and interplead one with the other, and contest one against the other: yet for the reader's better ease, and ability to find out that which may concern him in his particular case, I will, in the best sort I can, place them in several rooms or stations. First, considering how it shall stand between one judgment and another, had either against the executor or testator. Secondly, how between judgments and statutes or recognizances. Thirdly, how between recognizances and statutes. Fourthly, how between one recognizance and another. Fifthly, how between one statute and another; adding to each some observations incident.

Now, next to the debts of the Crown, are judgments or debts recovered against the testator, to have priority or precedency in payment, as being of a higher nature, or more dignity than any

Co. l. 5, f. 81.
So Wray and
Gaudy, inter
Bond & Bales,
28 El. vel. cir-
citer.

Yea, though a
writ of error by
the executor to
reverse the
judgment, yet
suffering a stat.
to be executed,
must pay of his
own. Read &
Beach.

Locke's Case. P.
43 Eliz. Barre.
So held in
Read's Case,
sup. Vide

other (1); for that statutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary consent of parties; whereas, in every judgment there hath been a course and work of justice against the will of the defendant, as is presumed, and this in a court of justice, and the records of such judgments are entered in public rolls, not kept or carried in pockets or boxes, as statutes, and, until enrolment, recognizances are. Therefore executors must take heed that judgments against their testators (before debts any other way, if they have not sufficient for both) be first satisfied, lest they draw the burthen of this debt upon their own backs (2). Now their way to help themselves, being sued or pursued for other debts, is the same before delivered touching debts upon record to the Crown, viz. by plea, where they may plead, as in *scire*

(1) Roll. Abr. 926; 3 Bac. Abr. 80; Com. Dig. Adm. c. 2; Cro. El. 793.—(E.)

(2) But of judgments no executor will be presumed to have cognizance, unless docquetted pursuant to the stat. 4 & 5 W. & M. c. 20, and *semble* until they are so docquetted they are only on a level with simple contract debts, and cannot be pleaded to an action on the latter. 6 T. R. 384; 1 B. & P. 307. When they are so docquetted, he is bound to take cognizance thereof. 3 Bac. Abr. 83; 11 Vin. Abr. 274, 291; Cro. El. 793. And it is the same whether there be several executors, and judgment be recovered against one only, or against him as administrator, or the contrary. Com. Dig. Adm. c. 2; 1 Sid. 434; Cro. El. 646, 471.—(E.)

facias upon a recognizance, or suit upon bond; and by *audita querela*, where they cannot plead, as when execution is sued upon a statute. And if they had no warning in the *scire facias*, but upon *nihil* returned, the judgment passed; there also the executor may be relieved by *audita querela*, because there was no default in him that he did not plead, or set forth the judgment upon the suit in the *scire facias*. Nor will it be any plea for the creditor by statute, to say that his statute was acknowledged before the judgment, and so is more ancient; for a later or more puisne judgment is to be preferred before a statute in time precedent(1). But if this judgment be

12 H. 7.
Kel. 24, 25, to
like purpose.
Co. L. 4, f. 59.
So Periam in
R.C. inter Char-
nock & Winsly,
34 Elis. vel dis-
citer. And
Cro. Elis. 822.

(1) Shep. Touch. But where a judgment ought to have been entered up against the representative, and not against the testator, or it is necessary to revive it against the former by *sci. fa.* such judgment, if on simple contract, cannot be preferred to a debt by specialty. 11 Vin. Abr. 279; Com. Dig. Pleader, 2 D. 9; 1 Wils. 243; 1 Salk. 42. When a *sci. fa.* is necessary to affect the personal representative with former proceedings against his testator, depends partly upon common law, and partly on several statutes. At common law, the death of either plaintiff or defendant, at any time before final judgment, would have abated the suit; by stat. 17 Car. 2, c. 8, s. 1, if either party died between the verdict and the judgment, judgment might be entered by or against him as if he were living, if signed within two terms after such verdict, but there must still be a *sci. fa.* to revive the judgment, and obtain execution; and such *sci. fa.* must follow the judgment. Where the death occurs before the assizes begin, the statute affords no remedy; but if he die after they have begun, it is within the operation of the statute, the assizes

Co. l. 5, f. 28. satisfied, and is only kept on foot to wrong other
 Co. l. 8, f. 132. creditors, or if there be any defeasance of the
 So held in 15 & judgment yet in force, then the judgment will
 16 El. So in the not avail to keep off other creditors from their
 sci. fa. by Bond debts(a). And thus much touching debts by
 v. Bales, it was
 held; & 3 Bac.
 Abr. 81.

(a) *Scire facias* against the defendant, executor of J. S. upon a decree in the exchequer against J. S. for money. The defendant pleaded that the testator was indebted to him upon obligation, and that he had paid himself before the *scire facias* brought, or notice of the decree. This case having been heard before, was ruled by Lechmore and Turton, barons, against Baron Powel, that it was not any bar. And now, upon re-hearing before all the barons, Atkins, chief baron, agreed with Lechmore and Turton, *contra* Powel, that it was not any bar (1). And that a decree in equity doth oblige executors, in equal degree at least, with a judgment at common law. Lev. 3, p. 355: *Shafto v. Powel in Scacc.*—(C.)

(1) Where an executor acts in obedience to a decree, the Court will protect him by injunction, but he cannot plead or give it in evidence. 11 Vin. Abr. 291; 1 Vern. 143; Ca. T. Talb. 217; Freem. 334; 4 Br. C. 287; 3 P. Wms. 401 (n. F.); 1 Ves. 214.—(E.)

assizes being considered in law but as one day, and the statute is to be construed favourably.

By the stat. 8 & 9 W. 3, c. 11, s. 6, when the party dies after interlocutory and before final judgment, the plaintiff or his representative is still entitled to enter his judgment, and have a *sci. fa.* against the defendant or his representative. If the party die before interlocutory judgment, it cannot be signed after, and the case is not within the statute. *Saunders*, 72, m, n, o, and the cases there cited.

If judgment be signed in vacation, it has relation to the

judgment, viz. how they stand in priority before other debts by statute or recognizance. Now to see how they stand among themselves, let this be observed, viz. that between one judgment and another had against the testator, precedency or priority of time is not material; but he which first sueth execution must be preferred; and before any execution sued, it is at the election of the executor to pay whom he will first. Yea, if each bring a *scire facias* upon his judgment, the executor may yet confess the action of which he will first, notwithstanding the *scire facias* was brought by the one before the other(1). In this *scire facias* the defendant may plead generally, that he hath fully administered before the *scire facias* brought, without showing that he did administer in payment of debts of as high nature; yet that must be proved upon the evidence, else

first day of the preceding term, and an execution founded thereon, tested the first day of the term, may be taken out, although the party died before the actual signing of such judgment, 7 T. R. 20; but if the writ be tested after the defendant's death, it is irregular, and the plaintiff must revive the judgment by *sci. fa.* against his representative. 6 T. R. 368; 11 Vin. Abr. 292; Com. Dig. Adm. c. 2; 4 Co. 59, 60; 5 Co. 28; Hob. 195.—(E.)

(1) 11 Vin. Abr. 279; Com. Dig. Pleader, 2 D. 9; 1 Salk. 42. If the executor hath discharged out of the assets, the King's debts or other judgments, he may show it under this plea; but if he retains, in order to satisfy a judgment or a debt of a superior nature to the one sued for, he must it seems plead it specially. 2 Saund. 50; 6 T. R. 388; Lord Raym. 678; Salk. 311.—(E.)

the trial will fall out against the executor. Thus have I delivered the most material things, in my apprehension, touching debts by judgment; yet thereabout I will add, for the better information of the reader not studied in the law, these few things. First, that what hath been said, is only to be understood of judgments against the testator, and not of any against the executor himself; for of those, being but debts of specialty at the time of the testator's death, we shall speak after. Secondly, what is said of the testator, in case of an executor immediate, is likewise to be understood of the testator's testator, in case of executor of an executor; for where *A.* makes *B.* executor, and *B.* makes *C.* executor, there the goods which came from or were left by *A.* be not in the hands of *C.* liable to the judgment had against *B.* nor, on the other side, are the goods of *B.* in the hands of *C.* subject to the judgments had against *A.*; and the like is to be understood of statutes, recognizances, and bonds, as elsewhere is somewhat touched. Thirdly, recoveries or judgments by mere confession, without defence, are yet of the same nature, and to have the same respect, as other recoveries upon trial or otherwise; for though they may seem to be but of the nature of recognizances, which be *debita recognita*; yet do they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it; but in case of a recognizance it is not so, for there usually no action is entered, nor

9 E. 4, 14, 15.
Qu. of arrear-
ages of account
before auditors
without suit; for
the executors
are charged by
judgment of the
auditors by stat.
W. 2, judgment
of record.
10 H. 6, 24, 25.
Bro. Det. 183.

debt demanded (a). Fourthly, the foreshowed respect to debts by judgment is not to be enclosed within Westminster Hall, and be restrained to the four courts there, but may and must extend itself to judgments in other courts of record, viz. in cities and towns corporate, having power by charter or prescription to hold plea of debt above forty shillings, as in London, Oxford, &c.; for although there execution cannot be had of any other goods than such as be within the jurisdiction of that court, yet if the record be removed into Chancery by *certiorari*, and thence by *mitimus* into one of the Benches, so execution may be had upon any goods, in any county of England (1). Fifthly, in case where the testator was

Swinb. p. 6, s. 16. Sed quære of judgment in a writ of annuity for arrearages after.

(a) Where the plaintiff saith that he was possessed by virtue of the will of the term for one thousand years, where the devise is to him for life only, the remainder to his son, and the heirs male of his body, it is good, *per cur.* For the remainder to his son is but contingent if any remainder of the term shall be; for every estate for life is, in supposition of law, of greater continuance than any estate for years; and therefore the whole term is in the father during his life, and the remainder to his son is but a possibility. 3 Lev. 264, *Douss v. Earle*, 1 W. & M. Mich. in C. B. in cov.; Cro. Jac. 590; Bridg. 1, 3; Styl. 271; Win. 55; Hut. 60; 1 Jo. 17—(C.)

(1) But since the stat. 19 Geo. 3, c. 70, all such judgments may be removed into the superior courts, and execution issued thereon. So judgments in the court of *pie poudre*. 11 Vin. Abr. 297; 2 Vern. 89. The regulations of 4 & 5 W. & M. c. 20, do not extend to judgments in inferior courts, whether therefore they are docketed or not the executor must take

bound in a recognizance, and a *scire facias* brought against him, and thereupon judgment given, although this judgment be not, *quod recuperet*, as in case of actions of debt, but *quod habeat executionem*, yet since execution is the life, fruit, and effect of all judgments, this may now well stand for a debt by judgment, as I take it(1).

Of Recognizances and Statutes.

NEXT unto debts by judgment are those by statute or recognizance to be regarded by the executor (2); and because I find no difference of priority or precedency between these two, I there-

Com. Dig. Adm.
c. 2.
Cro. Jac. 9. 35.

notice of them at his peril. 11 Vin. Abr. 294; Cro. El. 793; 3 P. Wms. 117.

A decree in chancery is of the same rank as a judgment at law; if it has been obtained against his testator, he is bound to take notice of it, and shall be affected with implied notice of it. 3 Bac. Abr. 81; 2 P. Wms. 483. But if it be merely to account, it is no complete judgment until the account be ascertained; and, pending such bill, he may pay a debt of a higher or equal nature, which he could not do against a final decree. 11 Vin. Abr. 297; 3 Bac. Abr. 83; 2 Atk. 385; 3 Id. 392. But judgments of foreign courts are held merely simple contract debts. Doug. 1; and see 11 Vin. 291; 2 Vern. 540.—(E.)

(1) Com. Dig. Adm. c. 2, and Yelv. 133.

(2) Recognizances not duly enrolled, or statutes irregularly taken, yet enure as obligations, and are payable accordingly. 2 Roll. Abr. 149; Cro. Eliz. 355. 461. 544; 1 P. Wms. 334.—(E.)

fore-rank them together: yet one reason of preferment given to judgments before statutes, in *Harrison's Case*, viz. that the one remains a record upon a roll in the King's court, whereas the other being carried in the pocket of the conusee is more private: this, I say, should give priority also to recognizances before statutes; as also another reason, for that statutes are not properly records, but obligations recorded: yet do I not find that this makes a difference for priority of payment. And indeed the statute is the more expedite remedy, since thereupon execution may be taken out without a *scire facias*, or other suit, which cannot be in the case of a recognizance; for there, if a year be past after the acknowledgment, no execution can be sued out against the party himself acknowledging it, without a *scire facias* first sued out against him; and if he be dead, then, though the year be not past, yet must a *scire facias* be sued, and thereupon the executor defendant may plead some plea to hold off the execution for a time. But (this notwithstanding) the executor may satisfy the recognizance before the statute, at least if he do it before execution sued thereupon; for they standing in an equal degree, it is at his election to give precedency and preferment to whether he will. Neither is it material which of them were first or more ancient; nor, between one statute and another, doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the

Lib. 5, 22, b.

Before sci. fa.
not after, voluntarily, but if levied by writ of extent, is good.
And see 11 Vin. Abr. 299.
2 Anders. 157, pl. 87.

these should keep off the payment of debts, and yet themselves perhaps never be forfeited; nor the sums become payable (1).

Of Debts by Specialty.

Now come we to debts due by specialty, *viz.* bond or bill, of which nature the greatest number of debts are. Let us then see what course the executor must or may hold for satisfaction of these, admitting that the testator stood not indebted to any record, or that no forfeiture is of any such debt, or that there be goods in the executor's hands above the amount of such debts by record. This, I say, *dato*, then according to the rule, *proximus quisque sibi*, the executor may first satisfy himself of such debts as the testator by specialty owed him; for such debts are not released by the creditor's taking upon him to be executor to the debtor; though, on the other side, if the creditor make his debtor executor, this is a release of the debt. Although it be given out, or commonly spoken in the general, that an executor

(1) There are also certain debts which are to be preferred, as forfeitures for not burying in *woollen*, by stat. 30 Car. 2, c. 3; monies due to the post office, by stat. 9 Anne, c. 10; and monies due from the testator as overseer, by stat. 17 Geo. 2, c. 38.

The executor of a deceased consor, when there are more than one, is only liable where the statute is joint and several; if only joint, the survivor can only be sued. 11 Vin. Abr. 288; 1 Mod. 165.—(E.)

may first pay himself, yet it is to be understood with this caution or condition, *viz.* that the debt to him be of equal height or dignity with the debts to others, according to the rule, *in æquali iure melior est conditio possidentis*: for if his testator were indebted to other men by any statute, judgment, or recognizance, and to him whom he maketh executor only by bond or other specialty, then may he not first pay himself; that is, by paying of himself, leave them unpaid whose debts are of a higher nature: but if there be sufficient for satisfaction both to them and himself, then is it not material which he first paid. Now, touching the debts to other men, the executor hath power to give preferment in payment to whom he will; so that if the testator left but 100*l.* being indebted to *A.* 100*l.* and to *B.* 100*l.* by several obligations, the executor hath power to pay *B.* his whole debt and to leave *A.* altogether unpaid any part of his debt, so as he have not commenced any suit before payment to *B.* (a) But yet, herein this difference

28 H. 8. Dy. 22.
Doct. & Stud.
c. 10, p. 78.

(a) If there be divers obligations, he may pay which of them he pleases first; unless the day of payment in one obligation be past, and the day of payment in the other obligation not come; for then that is to be paid first where the day of payment is past; or unless one obligation be put in suit, and the other not; for then that in suit must be first paid: and if there be two obligations, put in suit by two creditors, against the executor, then he which first gets judgment must first be paid; and in this case the executor, if he will, may suffer judgment in that which was last put in suit, and so pay him off first; then, after these obligations, simple bills are to be paid; then rents in arrear by the tes-

is to be taken and observed by executors: that if the time of payment upon the bond of *B.* were not come at the time of the testator's death, then may not the executors, before the money to *B.* become payable, pay him, and leave *A.* unpaid, whose money was presently due (1). Yet if *A.*

tator; then servants and head-workmen's wages; then merchants books; and lastly, contracts by word, in which the testator could not wage his law, upon which the executor may be sued in an action upon the case, upon the promise of the testator. 2 Inst. 32; 3 Inst. 202; 4 Rep. *Harrison's Case*; 5 Rep. 28; 9 Rep. 86.

Assumpsit against the defendant, executor of Walwin: the defendant pleaded an obligation of 40*l.* entered into by the testator, yet unpaid, and no assets beyond 5*l.* which were not sufficient to satisfy the aforesaid debt. The plaintiff replied, that the obligation was conditioned to pay 20*l.* at a day yet to come; and upon demurrer, judgment for the defendant; because the plaintiff did not say, in his replication, that the defendant had assets *ultra* to pay the 20*l.*; for if he had not, he was not obliged to pay the plaintiff the debt upon contract, before the debt due upon an obligation at a day yet to come. Lev. 3 p. 57, *Lemun v. Fooke*, Tr. 34 Car. 2, in C.B. —(C.)

(1) If the condition be for observance of covenants, and none are broken, or for payment when an infant come of age, now shall it be no bar to other present debts, for the infant may die before that time, and it would be to allow him to elude a just debt by a contingency that would never happen. 3 Bac. Abr. 81; Roll Abr. 925; 5 Co. 28; Swinb. p. 6, f. 16. So if the bond be merely voluntary it shall be postponed to *bona fide* simple contract debts, but preferred to legacies which arise by the will, whereas the bond is an obligation arising in the life-time. 3 Bac. Abr. 81; 11 Vin. Abr. 304;

forbear to demand or sue for his debt till the debt of *B.* become also payable, then is it at the will of the executor to pay whether of them he will, so as the other may lose his whole debt, if the goods will not suffice to pay both? What if *A.* have only by word demanded his debt, and not by suit,

Com.Dig. Adm.
c. 2. § Swinh.
p. 6.

Ca. T. Talb. 156; 1 Eq. C. Abr. 143. 84; Pr. Ch. 370; Finch, 232; and 3 P. Wms. 339.

So debts by mortgage belong to the same class, and are equally payable out of the personal assets; 1 P. Wms. 291; 2 *Id.* 358; 2 Vern. 273. 524. 763; but the other creditors, and indeed legatees, have been held in equity entitled to the benefit of the mortgage, in respect of what has been so taken out of the personal fund. Com. Dig. Chan. 29, 11; Salk. 449.

A bond is equally a specialty debt, although it be not yet due by the condition, for the obligation is a present debt, and the condition only a defeasance; and the executor may plead such bond and cover assets to the amount of it. 3 Bac. Abr. 81; 11 Vin. Abr. 304; 3 Lev. 57; Leon. 187; Cro. El. 315; Cro. Car. 362; Ca. T. Hard. 228. So if it be a joint and several bond; but if it be only a joint obligation, then only the survivor must be charged. 11 Vin. Abr. 288; Freem. 127. But a bond, which is a mere contingent security to indemnify, cannot be set up against a debt due by simple contract. Yet, if after payment of the latter, in preference, the contingency should arise, *semble*, the executor may prove such payment on the plea, *plene adm.* 11 Vin. Abr. 307. 395; Allen, 40; Ambl. 160; 2 Vern. 101; *sed vid.* Goldsb. 142. And if the contingency has taken place, although the debt consequent thereupon has not been paid, yet he may show, by such plea, a full administration, except so much retained to satisfy such indemnity bond. 5 T. R. 307.

If a bond be given for an illegal consideration, it will be a *devastavit* to pay it in preference to creditors or even legatees. 1 Ves. 254, and see 11 Vin. Abr. 307; Hob. 167; Brownl. 33.—(E.)

Dr. & St. p. 78.
 Quære if then
 he may not
 plead this pay-
 ment post ult.
 contin. against
 A. as he may
 plead it against
 other suits after
 commenced.
 Co. lib. Intr.
 148, 269, 149, a.

before the debt to *B.* become payable? Whether doth that hinder that the executor may not now, when the money to *B.* is also payable, pay him, and leave *A.* unpaid? And hereunto *St. Ger.* answereth negatively, making this verbal demand to be idle, and of no value. Yet he addeth, that if *A.* have commenced suit before the debt to *B.* become payable, yet if the executor can delay the suit till the debt of *B.* become payable, so that *A.* can get no judgment before that time, and before *B.* hath commenced suit upon his bond, then may the executor confess his action, and so pay his debt, leaving *A.* unpaid (1). But of this I make

(1) And the law is now clear upon this point, that although an executor cannot justify a voluntary payment after notice, by a suit duly commenced, of a debt of an equal degree, yet by confessing judgment for the debt to which he would give a preference, he makes it one of a higher degree, and so may plead it to the action in bar of any other; and he may do so even after interlocutory judgment. 11 Vin. Abr. 296, n.; 3 Bac. Abr. 83; Com. Dig. Adm. c. 2; 2 Vern. 62. 300; 1 Lev. 200; Carter, 228; 2 Fonbl. 411; 2 Ch. Ca. 201; 1 P. Wms. 295; 2 Atk. 386; 5 T. R. 238. But such plea must go on to aver that he had no notice of the plaintiff's debt. 1 T. R. 690.

If he omit to plead such judgment, and afterwards judgment be given against him in the suit on the specialty debt, he will be bound to satisfy both, though there be no assets; for he might have discharged himself by plea. Com. Dig. Adm. c. 2; 3 Lev. 114.

But if he plead a false plea, it shall bind him, *de bonis propriis*. And although it has been decided that a decree in equity cannot be pleaded in bar at law, yet it is to be deemed equivalent to a judgment, in the administration, and the

some doubt, for that I find in time of King Edward the Fourth, some admittance, that if *A.* having a tally, patent, or other warrant from the King for receipt of money of or from a customer or receiver, where other had like warrants before him, but *A.* making the first demand, now must the officer first pay him, or else himself shall become debtor to him, if he first pay others whose demands were after made, though they had warrants before *A.* Likewise there is, as to me seems, some admittance in the same book, that the very demand made by a creditor of his debt from an executor, who hath then assets in his hands, doth entitle the creditor to recover damages against the executor out of his own goods; which, if it be so, then doth even the verbal demand lay some tie or obligation upon the executor for payment (1). But hereabout I lay down nothing peremptorily. We partly may discern by the premises how the executor is to guide himself, in the case where

executor will be protected by injunction. 1 Vern. 143; 2 *Id.* 37. 88; 4 Bro. P. C. 287; Ca. Temp. Talb. 217; Bunb. 48; 3 P. Wms. 401, n. F.

A judgment confessed pending a suit in equity may be made equally available to protect the executor in payment (Ca. Temp. Talb. 225; 1 P. Wms. 295); and that even after a decree to compute; for that is only in the nature of an interlocutory judgment. Ca. Temp. Talb. 207; 2 Atk. 385.

(1) But it is settled, that a mere demand is not sufficient to divest him of this privilege. 11 Vin. Abr. 228. 270; Sid. 21.—(E.)

41 E. 3. Fitz.
 Ex. 68. 6 & 7
 El. Dy. 232.
 Vide 21 H. 7.
 Kelfw. 74. So
 Walmsley, Just.
 P. 39 Eliz. in
 error at Ser-
 geants Inn. Co.
 lib. Intr. 286.
 Such a recovery
 by confession is
 pleaded against
 another, and
 admitted good,
 and f. 148, 149.
 Dr. & St. p. 78,
 b.

there be divers debts by specialty, all due and payable at the testator's death, before any suit commenced for any of them; for in that case clearly the first verbal demand gives not any precedence, all being due, and so standing in equal degree. And this is implied in many books(a), making the commencement of the suit only that which entitles to priority of payment, or at least restrains the election of the executor. Yet admit that one creditor first doth begin suit, if others also after sue before he be paid, or have judgment, now cannot the executor pay him first who first commenced suit, but he who first hath judgment must first be satisfied. And the executor may herein yield help to one before the other, viz. by essoigns, imparlances, or dilatory pleas to the one, and by quick confession to the other's action; for he is not bound against his will to stand out in suit, and expend costs, where the debt is clear: nor is this covin, but lawful discretion, which conscience will also approve, some good consideration inducing. Nay, after suit commenced, yet until the executor have notice thereof, he may pay any other creditor, and then plead that he hath fully administered before notice(1). Nor is the sheriff's return of summons

(a) It is notice of the suit. 3 Bac. Abr. 83; 1 Mod. 175; Fitzgib. 77.—(C.)

(1) Plowd. 279; Law of N. P. 178; 3 Mod. 115. So if a reasonable time hath elapsed without notice of the debt, it

or distress sufficient cause of notice; for the summons might perhaps be upon his land: but if it were to his person, it is notice sufficient; and then, to save himself, he must say, that he was not summoned till such a day, before which he had fully administered. Yet doubtless the executor may be arrested at the creditor's suit in some sort, which yet shall be no sufficient notice of this debt. As for the purpose, if he be sued by *latitat* out of the King's Bench, this, supposing a trespass, gives no notice of a debt; so also of a subpoena out of the Exchequer; but the original, returnable in the Common Pleas, expresseth the debt, and so in some sort doth the process thereupon. And there it seems by some books, that if it be laid in the same county where the executor dwells, he must take notice of it at his own peril. But this I take not to be law, nor is there any great opinion that way; and although, to make it more clear, the executor (in King Henry the Fourth, his time) estranging himself from notice of the suit before payment to others, did allege that the action was laid in a foreign county, that is no great proof that if his abode had been in the county where the action was

So also was it
said Tr. 29 El.

seems he might justify payment of inferior debts. Pr. Ch. 534; 3 Bac. Abr. 82, n.; 3 Lev, 115; Ambl. 162. Yet he will be bound by constructive notice in the cases of judgments and decrees in equity, without any actual notice. 3 Bac. Abr. 83, n.; Dyer, 32; 2 Vern. 88; Cro. El. 793; 3 Mod. 115.—(E.)

brought, he must have taken notice; but thus it was clearer, and a surplusage hurts not.

Rent.

Now between a debt by obligation and a debt for rent or damages upon a covenant broken (1), I conceive no difference, nor any priority or precedency; but it is at the executor's discretion to pay first which he will, as if all were by bond (2). So also of rents behind and unpaid, as I conceive; but touching them, principally intending rents upon leases for years, divers considerations are to be had, and some distinctions to be made (a). As first, between rent behind at the

5 Co. 82.
Cro. El. 400.
2 Saund. 49.
1 Mod. 175.
Vaugh. 94, 95.
Kelw. 74.
1 Sid. 21.

(a) Debt for rent upon a lease-parol for three years, from the 28th of September, 1685, rendering 90*l.* per annum rent, and for 270*l.* rent, due Michaelmas, 1688, was the action brought after the term ended against the defendant, executor of the lessee, who pleaded an obligation entered into by the

(1) Even when the damages are not liquidated. 3 Bac. Abr. 81; 11 Vin. Abr. 292. 305; 6 Mod. 144. And where the covenant was that his executors should pay, *semble* they are equally bound, although the testator himself could not have been sued. 11 Vin. Abr. 276; Shep. T. 990.

(2) Com. Dig. Adm. c. 2; 1 Salk. 326; Cro. El. 231; 3 Burr. 183. 1384; 1 P. Wms. 429. And whether the lease be by deed or by parol, it is immaterial; for the debt arises from the profits of land, and is therefore considered as a specialty debt. So if the lease be determined, the nature of the debt remains unaltered; the only difference is, that now the lessor is deprived of the more summary remedy by distress. 3 Bac. Abr. 82. 96; 11 Vin. Abr. 289; 3 Lev. 267; 2 Ventr. 184; Comyn R. 67. 145; Comb. 183; and Stat. 8 Ann. c. 14.—(E.)

time of the testator's death, of which *that* before said is to be understood, and *that* which groweth behind, after; next between suit for the rent by action of debt, and distress and avowry. As to the first difference, if the rent grew due since the testator's death, then is it not accounted in law the testator's debt; for only so much is in law accounted assets to the executor, as the profits of the lease amounted to over and above the rent; so as for *that* rent so behind the executor himself

Cro. Jac. 238.
Lord Rich. v.
Frank, adminis-

testator, and that he had not assets *ultra 5l.* which are not sufficient to satisfy the debt upon the obligation. The plaintiff demurred; and the question was, if this rent upon lease-parol, and the term ended, be payable before the debt upon obligation? And it was argued for the plaintiff, that the rent being due upon real contract, although it be by parol, is of a more high nature than the obligation. But for the defendant it was said, that the term being ended, the arrears are become mere personal: otherwise it had been, perhaps, if the lease had remained *in esse*, because then the plaintiff might have distrained for it. The authorities cited were, Style, 2. 61; 1 Roll. Abr. 927, s. 2, 3; 11 H. 4, 79, b; 13 H. 4, 9; none of which come directly, nor is there any authority to be found in the books direct in this case. *Quod Cur. admirabat.* being a case which often happened. Pollexfen, justice, inclined for the plaintiff, for the defendant could not wage his law, which proved it not to be merely personal. Powel, justice, inclined to the difference, where the lease-parol is determined or not, and *adjornat.* But afterwards judgment was given *per tot. cur.* for the plaintiff; upon which a writ of error was immediately brought in B. R. and in Trin. 3 W. & M. the judgment was affirmed *per* Holt, chief justice, and *tout le court*, who held, that the contract remained in the realty, notwithstanding the term was determined. Lev. 3 p. 267, *Newport v. Godfrey.*—(C.)

3 Mod. 115.
Vide ante,
p. 147.

trator, for rent due after the death of intestate; adjudged upon motion in arrest of judgment, that the action well lay in the debt and detinet. Pas. 8 Jac. B. R. though the like judgment in B.R. in the case of Body and Hargrave, given Mich. 41 El. was afterwards reversed in Camera Scac. Cro. El. 711; and see 1 Salk. 297. 317.

stands debtor, as hath been resolved, and therefore he is suable in the *debet* and *detinet*; whereas for rent behind in the testator's life, and all other the debts of the testator, he must be sued in the *detinet* only (1). Hence it must follow, as it seems, that an executor sued for debt upon a bond or bill, cannot (except in some special cases) plead a payment or recovery of rent grown due since his testator's death; though of rent behind at the time of his death it be otherwise. And yet here again another difference or distinction is to be taken, *viz.* where the profits of the lease exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elsewhere is showed, the executor, if he have assets, is tied to the holding of the lease, and payment of the rent, and consequently doth so much of that rent as exceeds the yearly profit stand in equal degree the testator's debt, with other debts by specialty. And yet again, to reconsider this point, what if the debts of the testator by specialty payable presently at his death, or before the time that any rent can grow due upon this lease, shall amount to the full value of the testator's goods: may not then the executor, though he do not pay those debts before the rent-day (for that would make the case clear), waive the term? For if he may, then haply, if he do not so, but shall by payment of any of this rent

(1) And to such action he may plead *plene adm.* Com. Dig. Adm. B. 14; and 1 Wils. 4.—(E.)

want goods to pay any part of the debts by specialty, it may lie upon himself and his own goods, as happening by his own default⁽¹⁾. But on the other side, it may be said, that he could not waive it so long as he had assets, because thereby he stood equally liable to pay *that* debt, being once due, as the other debts by specialty. On the other side, it may be said, that though the debts for rent and upon bond shall be admitted to be in nature equal, yet the case being put of rent not due at the time of the testator's death, it was not then a debt nor duty; whereas a bond makes a present debt and duty, though not presently payable, the day of payment being not yet come, so as this later is discharged by a release of debts or duties, and so is not the former^(a). So to

Though they have the land as executors, yet nothing shall be employed to the execution of the will, but such

(a) If executor of lessee for years assign over his term, an action of debt doth not lie against him for rent due after the assignment: the like, if the lessee assign over his interest and die: but if he assign but part of the matter or land granted, it is otherwise; and in some cases it shall be apportioned. 3 Rep. 24, *Walker's Case*.

Debt for rent, and declared on a lease made by the plaintiff to J. S. who made J. D. executor, who assigned the term to the defendant: the defendant pleaded, that before any rent arrear he assigned the term to J. G. but did not plead notice of it, nor acceptance of the rent from him by the

(1) Therefore he may relinquish the lease whenever the property in his hands to be administered is insufficient to pay the rent; but he is bound to continue tenant until that is exhausted. Com. Dig. Adm. B. 4; 1 Salk. 297; 1 Lev. 127, and *supr.*—(E.)

profits only which are above that which is to make the rent, and therefore so much of the profits as is to make or answer the rent, they shall take to their own use, and they shall be charged for it in the debet and detinet. Pop. 120, per Popham. And if the land be not more worth than the rent, it is a good plea to such action in the debet and detinet, for in such case he is to be charged in the detinet only. Vent. 271, per Cur.

leave that point unresolved, let us next see whether, in some case, though the rent exceed not the yearly value of the land, yet even that payable after the death of the testator may not stand in most part, if not wholly, upon the testator's score, as his debt, as well as if it had been payable before his death. *Posito*, then, that the whole or half-year's rent is payable at the Annunciation of our Lady, and that the testator dieth two or three days, or some like short time, before that feast; now certainly should the law be unreasonable, if it should lay this debt upon the executor's shoulders, in respect of those few winter days profits which he took. But surely, since the taking of the profits induced the law to lay the rent upon the executor as his own debt, there-

plaintiff; whereupon the plaintiff demurred; and it was adjudged for the plaintiff, by Pollexfen, chief justice, and Rokesby, justice; *contra* Powel, justice, who held, that the privity of the contract being altered by the assignment of the executor before any rent due, and also the privity of estate by the assignment of the assignee of the executor, nothing remained whereupon to maintain the action. Pollexfen, chief justice, and Rokesby held, that till notice of the assignment it was not a complete assignment to destroy the privity of estate, but till notice he remained tenant as to the payment of the rent. As in the case of lord and tenant, if tenant make a feoffment, yet he remains tenant as to the avowry till notice of the feoffment and tender of arrears. Lev. 3 p. 295, *Tongue v. Pitcher*, 3 W. & M. in C. B.; and see 1 Sid. 266. 338; 1 Lev. 127. 308; 2 Lev. 231; 2 Saund. 181, 182. 302, 303; 2 Vent. 209; 3 Mod. 325; 4 Mod. 71—76; 1 Show. 340.—(C.)

fore, as where the executor had the profits for the whole year or half year, except some few days incurred in the testator's lifetime, those few days will be unregarded, according to the rule, *de minimis non curat lex*, and the whole rent shall lie upon the executor as his own debt; so on the contrary part, when the whole year or half-year's profit, except some few days, incurred after the testator's death, the rent, becoming payable so instantly after the testator's death, must in reason lie wholly upon the testator's estate, as to me it seems. What if to this I add, that the testator's cattle, wherewith the ground was stocked, do depasture and devour the profits all the time after the testator's death, till the day of payment of the rents? Nay, if the rent were payable at Michaelmas and the Annunciation, and the testator dies a few days after Michaelmas, the rent being of or near the value of the land, it will then be hard that the executor shall for this winter profit pay the rent out of his own purse, especially if the whole year's rent be payable at that one day, as in some cases it is; or if the whole year's profits were taken in the summer, as in case of a lease of tithes: it is so also of meadow grounds, usually drowned in the winter. So if the lease be then to end, not having a summer half-year to succeed and make amends for the winter: or if the winter half-year be the later half, the lease beginning at Lady-day, so that there is but a summer for each winter following, and not any for the winter passed. Of like consideration with these is the case of a lease of

woods for a rent, which being fellable but once in eight or nine years, now if the lessee having made the last sale and felling before his death, the law should cast the rent upon the executor's own estate for the time future, it should lay loss upon him ; which is against reason, and contrary to the nature and disposition in the law, even in this particular : as appears by this, that she enables an executor to pay himself before any debt of equal nature ; so as she more tenders an executor's indemnity than any other creditor's. Therefore I think that, with and upon the differences above showed, even rent grown due after the testator's death may in some cases be the testator's debt payable equally with debts by bond. But here I conceive, that if the executor were in such case of destitution of assets as might justify his waiving of a lease over-rented, he then may waive the term's residue, because for the future the profit will come short of answering the rent, though at the first, and so in the total, the profits did exceed the rent. And if, for want of waiving when he might, this rent fall upon him, the payment thereof would be no excuse against another creditor, nor as to him be a good administration ; for *ignorantia juris non excusat*, this is pertinent to our present consideration, which debt may with safety be paid, leaving another unpaid ; and the hazard of executors by ignorance of the law had been a principal motive to my writing these discourses in English. Hitherto we have only considered, as I think, of rents as they be recoverable

Where executor
ought to waive
the term.

by action of debt. Now let us see if there may not be somewhat different considerations touching distraining for rent, and so coming to recover it by avowry (*a*). Put we then the case, that an executor hath fully administered in payment of debts by bond, and after the lessor or reversioner cometh, and distraineth for arrearages of rent due in the testator's life; can the executor in bar of the avowry plead fully administered, as he might have done if an action of debt had been brought for these arrearages? Doubtless I think no; nothing shall hinder the levying of the rent upon the land, as long as it is enjoyed under the title of the lease, except the land come to the King, upon whose possession no distress can be taken. I think, therefore, that the executor who paid out of his own purse to the value of this lease (for so I intend the case, and else could he not have fully administered, as in the case was put), should have abated, in the price and valuation of the lease, as well the arrearages of rent as the rent futurely payable, both being equally leviable upon the land; and if he so have done, he is no loser by payment of this arrearage: but if, trusting to the power of an executor, and to the plea of fully administered, he did not so, but disbursed in respect of the lease, to the full value without such

(*a*) Where he in remainder, and not the executor of tenant for life, shall be charged by distress for rent arrear in the lifetime of tenant for life. 5 Rep. 118, *Edriche's Case*.
—(C.)

Where executor
may plead rent
in arrear.

abatement, he must bear the loss of his own ignorance. He might also another way have helped himself, *viz.* by payment of that arrearage, leaving other debts by specialty unpaid. And what if suits were presently commenced upon the testator's death, before he could make payment of the rent behind? Whether might the executor then plead this debt for rent, as he might a debt by judgment or statute? Surely, methinks, it is probable that he might, because it is a debt from which he cannot be freed by payment of the other debt sued for by specialty (1). If the reversioner would also commence suit before judgment had for the creditor by specialty, then might the executor help himself by confessing his action first: but this perhaps the reversioner would not conceive safe for him, since that way the others might get judgment before him, and so he might lose both his suit and his debt; whereas holding himself to the course of distress, the lease continuing, he hath land at the stake for his debt. What if he distrain and avow? May not now

(1) Rent, whether reserved by deed or by parol, arising equally from the profits of land, is regarded as a debt by specialty. As to rent accruing in his testator's lifetime, he can only be sued in the *detinet*, and plead thereto that he has fully administered; but for subsequent rent he is to be regarded personally chargeable, and, as an assignee, may be charged in the *debet* as well as *detinet*, having no power to waive the term. 3 Bac. Abr. 82; 11 Vin. Abr. 289, n.; Com. Dig. Adm. B. 14; 3 Lev. 267; Com. Rep. 67. 143; Comb. 183; 1 Wils. 4; 1 Salk. 297. 317.—(E.)

he executor pay him, or at least confess his action or avowry, so as he first having judgment may first be satisfied? Surely, after suit commenced, I see not how the creditors by bond can be prevented, at least without a judgment had for the rent, yea though such a judgment be had; yet because the judgment in that case is not that he shall recover the sum due for rent, but only that he shall have a return to the pound of the cattle distrained for the rent, it is questionable whether the payment thereupon of the rent shall prevent the judgments after had in the suits upon bonds: but I think it shall; because although it be not an express recovery of the rent, yet it is such a judgment compulsory for the same as makes the payment inevitable and of necessity. And where before we have made the question only between the said rent-debt and the debt by obligation, let us now put the case between the rent-debt and the debt by statute or judgment. If then the lessor, after death of the lessee, distrain for the rent behind part of the testator's cattle, and after there comes a writ of execution upon a judgment or statute of the testator's; whether shall these beasts in the pound for rent be delivered in execution or not, admitting that without them there be not goods sufficient for satisfaction of the judgment or statute? And surely, I think, they cannot be delivered in execution. First, for that they are in the custody of the law, as in *Stringfellow's Case*, though there the King's prerogative overtopped

See 13 R. 2.
Bro. Pledges,
31. Attainder
of the party dis-
trained shall not
take away the
distress. Vide
Dyer.

that point. Yea, so I think, though they be replevied, for that they are to be returned to the pound, if judgment pass for the avowant, to which purpose security is given; so as they are but in the case of a prisoner bailed, who still is in some sort in custody. Secondly, for that this rent, incident to and descendible with the reversion, breeds a debt of a real nature, and so of more dignity and worth than debts personal. Thirdly, for that the land let (as in a sort debtor) stands chargeable with this distress from the very time of making the lease, as either by contract real of *quid pro quo*, or rather by an operation of law or legal constitution, or ancient custom of the realm, without any contract of persons. Lastly, for that the lessor doth not distrain the cattle therefore, or in that respect, for that they are or were the goods of the testator, but for that he found them levant and couchant upon the land which must afford his rent, or a distress for it if behind: so as if they had been any under-tenant's or stranger's cattle, they might have been distrained. Some may perhaps object this reason why these impounded cattle should be delivered in execution, *viz.* for that where otherwise the creditor by statute or judgment should lose all or part of his debt, yet by this relief done to him shall not the lessor lose his rent, for that he may at any time after distrain any goods or cattle found upon the ground, at any time during the continuance of the lease. But here, besides the point of delay and stay for this rent, which to

many is the sole means of maintaining their households and families, this farther is considerable, that perhaps the lease may be near expiring, perhaps so highly racked and rented even to or above the value, as that the executor, having his testator's stock taken from it and him by execution, will not stock it any more; and so the land lying fresh, if the lessor shall lose the benefit of his former distress, he shall be perhaps without remedy for his arrearages of rent. And if the case were of a distress for rent behind after the testator's death, I conceive, though not so strongly, for most of the reasons above said, that the law would be all one as in the other case: for though in this case respect shall not be had to the executor's loss, upon whose goods the law casts this debt though not the other, yet here the point of loss must fall either upon the lessor losing his distress, or upon the other creditor by specialty or record losing wholly or in part his debt. And in respect of this local tie upon this land for payment of the rent, whereto even the fealty of the lessee and tenure of the land bindeth him, I think no act that the lessee can do, by entering into bonds or statutes, or having judgment against him, can hinder the lessor or reversioner from taking his remedy upon this leased land for the rent therefore due; but rather any other creditor shall be a loser in his debt. Doubtless, if in bar to the avowry for this rent, due either before or since the testator's death, the executor will plead, that the testator was indebted 1,000*l.* by statute,

Vide Bro.
Pledg. 31.

So Bracton.

recognizance, or judgment, which is more than all his goods amounted unto; it will be no good plea; but may be demurred upon. What if he plead so much debts of record to the Crown? Surely, I doubt whether this plea will be allowed in any other court than in the Exchequer; yet if these arrearages of rent shall be levied upon the land, so as either the executor must pay it or lose the cattle distrained by a return irreplevisable, and then shall not have sufficient to satisfy the debt to the Crown, I see not how he shall well escape, when pursued in the Exchequer to make up this Crown debt out of his own purse, which is hard; for this we may pitch upon as a maxim and principle, that an executor, where no default is in him, shall not be bound to pay more for his testator than his goods amount unto. Again, it is a rule, that where nothing is to be had, viz. justly to be had, the King loseth his right. And our books tell us, the King's prerogative must not do wrong. *Potestas ejus juris est, non injurie: nam potestas injurie non est Dei, sed Diaboli.* On the other side, it may be said, that if land leased come to the King by grant, outlawry, or otherwise, the rent reserved cannot be distrained for; and therefore it is not very unreasonable nor incongruent that the King's interest for his debt should make the distress of a subject stand by and give place. This, therefore, among other of the premises, do I leave as a *quare*. Nor is it altogether unprofitable either for an executor or creditor to know what ways and passages, what

cases and contingents, be doubtful and hazardous. And if in these unbeaten paths, where our books and relations have held me forth no light, express or particular, I have erred in misresolving, or missing to resolve, I hope I shall without difficulty obtain pardon. By stat. 8 Ann. no goods on lands leased for lives, years, at will, or otherwise, shall be taken by virtue of any execution, unless the party suing shall, before removal of the goods, pay to the landlord all rents due, not exceeding one year's rent.

Now let us consider of assumptions or promises made by the testator upon good consideration, the performance whereof, or making recompense and satisfaction for not performing, doth lie upon an executor, as before is showed (1). These therefore are to come behind, and give place unto all the former; so as an executor this way, or for these sued, may plead debts by specialty, rent, &c. amounting to the whole goods. And yet these debts by contract or assumption express, are to be satisfied before legacies be to be had.

Co. l. 9, f. 88, b.
Doct. & Stud.
l. 2, c. 10 & 11.

(1) And among simple contract debts, the executor is bound to discharge those due to the King, in the first place, and other such as are due to domestic servants and labourers. 3 Bac. Abr. 10; 1 Roll. Abr. 627; 11 Vin. Abr. 274; Shep. T. 478. 986.

But by the custom of London, a simple contract debt, due from one citizen to another, is in the same degree as a specialty debt, and payment of it shall be binding on a specialty creditor, though a stranger. 3 Bac. Abr. 82; Roll. Abr. 557; 5 Co. 81, b. 83; Noy 53; Andrews R. 340; Cro. El. 409.—(E.)

Co. l. 9, f. 90,
Pincham's Case;
& f. 94, Dane's
Case.

First, because by the common law of the land these are recoverable, and so are not legacies. Next, because, as our books speak, it concerneth the soul of the testator to have, *as alienum*, all duties and debts to other men satisfied before the debtor's voluntary gifts or bequests. Also these debts by assumption or simple contract, are to be satisfied before the reasonable part of the wife or children, to which by custom, in some countries they are entitled. See 21 Ed. 4, 21; and 2 Ed. 4, 13; and 2 Hen. 6, 16. And note, that in such an action upon the case, it is not of necessity to lay or set forth in the declarations, that the defendant hath assets to pay all debts by specialty and this also: but if there want, the defendant must allege that in his excuse, for else it shall be presumed that he hath assets. So also in an action upon a case, grounded upon the executor's own assumption to pay his testator's debt. And yet as the Lord Coke conceives, and upon good reason, as to me it seems, if the executor so promising had not assets sufficient in his hands to pay this debt promised, he pleading *non assumpsit* may give that in evidence; for then the consideration faileth; as also if there were no such debt due, since the plaintiff could not have recovered if he had sued, and so his forbearance to sue was no valuable consideration (1).

(1) In general, interest for forbearance or delay cannot be claimed against the executor, except where it might have been recovered from the testator as damages for the detention

CHAP. XIII.

OF DEVASTATION, OR WASTING.

THAT which St. Paul of Dispensers spiritual (who are as it were the executors of the last will and testament of our Saviour Christ) doth say or enjoin, *viz.* that they must be found faithful, the same is required of these less or inferior dispensers, the executors of men's wills: and hereof they are to be regardful, not only in respect of Escaping damage to their own estates, but more Especially in respect of an oath which divers of Our books mention to be taken by executors. And in one of the books of relations of cases in the Twentieth year of Henry the Seventh, his time, there is an expression of three things whereto the Office of an executor tieth him. First, to do truly, and thereto are they sworn, saith this book. Secondly, to be diligent, *viz.* with sedulity to attend

of the debt, as in action on judgments, or bonds to the extent of the penalty, on bills, and even book-debts, where it is the usage of the particular trade. In all such cases, it is usual to allow interest. Com. Dig. Chanc. 3, s. 1; 14 Vin. Abr. Interest, c. 2; 3 Br. Ch. R. 496; Dickens R. 305; 1 Ves. jun. 63; 2 *Id.* 162; 3 *Id.* 557; 2 T. R. 52. 388; 7 T. R. 124; Bl. R. 761; Burr. R. 1077; Doug. 376; 1 B. & P. 337.

the discharge of the trust. Thirdly, to do lawfully: nor well can this latter be without knowledge what is lawful or required by the law. Now what is formerly said of the right method and order of payment of debts, discovereth in much part how and by what ways an executor may waste and mispend his testator's goods, and consequently incur a devastation, and so make his own goods liable. But of that more fully and particularly by itself. And herein we will consider of these parts.

1. What shall be said to be a wasting or devastating, and how many ways that may be done.

2. Who shall by this act be charged to yield recompense.

3. Who shall take the benefit or advantage of it.

4. How far or in what measure the advantage shall be taken.

5. What way or by what means it shall be had.

As to the first, this wasting is done divers ways(a). First, by the executor, his plain, pal-

(a) *Devastaverunt bona testatoris*, is when the executor will deliver legacies, or make restitution for wrongs done by their testator, or pay his debts due upon contracts or specialties, whose days of payment are not yet come, &c. and keep not sufficient in their hands to discharge those debts upon record or specialties which they are compellable by the law to satisfy in the first place: then they shall be constrained to pay these out of their own goods, according to the value of what they voluntarily delivered or paid.

And where a judgment recovered in the King's court

pable, and direct giving, selling, spending, or consuming the testator's goods after his own will, leaving debts unpaid. Secondly, by paying what is not to be paid ; which yet is to be understood where there are debts payable, and unpaid (a).

shall be satisfied before a recognizance, &c. : and if the ordinary have goods of the intestate by sequestration, and an action of debt to the value of the goods is brought against him, as ordinary he shall not dispose or administer these goods to any other, but is bound to satisfy the debt for which action is first brought. *Termes del Ley.*—(C.)

(a) *Scire facias* upon a judgment against the defendant, and alleged that he had wasted the goods, and disposed and converted them to his own use. Issue *non devastavit, vendidit seu in usum suum proprium convertit* ; special verdict found, that one *A.* was liable to an action of trover to the defendant for goods of the intestate ; and that after action brought, the defendant and *A.* came to an agreement, by articles, that the defendant should discharge *A.* and that *A.* should pay to him a sum at such a day yet to come, *et si*, &c. ; and it was argued by Eyre, for the plaintiff, that the issue is found for him, because the defendant, by acceptance of a new security for payment of the money to himself, had extinguished the old right, as if he had accepted an obligation for a debt due by contract, and thereby hath made himself subject, although he hath not yet received the money ; for the new security is as payment to him. *Yel.* 10. To which it was answered by Pollexfen, that it could not be a *devastavit*, for he hath not done any wrong, but hath taken the best means that he might for to secure the estate ; and it is not like the case of an obligation taken for a sum due by simple contract ; for there is a debt certain, here are only damages to be recovered, in the discretion of the jury, which are made certain by the articles, but are not assets in his hands till the money received. *Curia*, it is not a *devastavit* : but after, by Sir

Thirdly, by the way formerly discoursed of, *viz.* the not observing the right method and order of payment (1). Fourthly, by assenting to a legatee's having a thing bequeathed, debts being unpaid. Fifthly, by selling goods of the testator's at an undervalue, for (be the appraisement what it will and let him sell for what he will) he must stand charged to the best and utmost value towards the creditors. Yet if, upon a judgment against the testator or the executor, the sheriff sell some of the testator's goods at an undervalue, this is no vastation of the executor; for this difference Hody, chief baron, makes. But since an executor may haply prevent this act of the sheriff, by paying the due sum upon sale of the testator's goods, at the best value or otherwise, he is to be blamed to leave it to the conscience of the sheriff,

Thomas Jones, it is a disposal or vendition, and conversion to his use, by the acceptance of a new security, by which he hath discharged the ancient right to the goods, and so it is *quasi* a sale of them, and assets presently, although that by his act the money is not payable to him till a day to come; to which some of the other justices seemed to incline: but it was adjourned; and after, at another day the next term, all the justices agreed that it was a disposition by him, and judgment was given for the plaintiff *per tout le court*. Lev. 2 p. 189, *Norden v. Levit.*—(C.)

(1) Where the executor brought error on a judgment, and thereby totally suspended its effect, and pending the writ of error satisfied a debt of a higher nature; held not to be a *devastavit*, for he was bound to discharge it. 11 Vin. Abr. 292. 298, 299, n.; and see Yelv. 29; Cro. El. 822.—(E.)

or under-sheriff rather. Sixthly and lastly, this may be done to the executor's smart by undue, *viz.* not legal discharging of any debt or duty pertaining to the testator, and that divers ways requiring heedfulness. As if an executor upon a bond of 200*l.* forfeited for payment of 100*l.* accept the principal, or perhaps also some use, costs, or damage, and give a release or acquittal of the whole forfeited bond, or of all actions, or upon record acknowledge satisfaction upon judgment had; this is a wasting of so much as the penal sum is more than is received, and so far his own goods stand liable to creditors not satisfied: and so doubtless is it, if he do but give up the bond, having no judgment upon it, though he neither make release, nor acknowledge satisfaction (a). But his verbal agreement to require or sue for no more, or his giving a note or receipt for so much as he hath received, or delivering of the bond into a friend's hands, or into a court of equity, in way of security to the debtor, that he shall not be sued for more, is no devastation, since still the rest in law remains due and suable. So this sets no more upon the executor's score than he received. But let him take heed of releasing, except he be sure there be no other debts demandable. Nor only is there danger in releasing of

13 E. 3. Fitz. 91.
Yet, on the other side, if an executor by payment of 110*l.* get in a forfeited bond of 200*l.* it shall be an administ. but of 110*l.*
27 H. 8, 6. P. Fitz. Inst.

(a) The delivery up of a bond by the executor, and taking a new bond to himself for the debt, is no conversion in equity to charge the executor with the payment of that money, though it is in law. But the executor was decreed to assign the security to the heir. Ca. in Ch. 74.—(C.)

Lib. 5, 27.

This discovery is difficult, for even a judgment in a court of Piepoudre is binding.

debts, but of trespass, or other causes of action also. As if one take away goods from the testator, or from his executor, if the executor make him a release, this is a devastation, and makes his own goods liable to the whole value of the goods released, as appears by *Russell's Case*, where the release of an infant executor, to one who had taken and committed to his use jewels and goods of the testator, being pleaded, the release was therefore held void in respect of nonage; for that if it should have stood good, it had amounted to a *devastavit*, and made the executor's own goods liable; which, his infancy considered, had been hard. Another way of discharging, dangerous to executors is, submitting matters of debt or damage touching goods taken away, to arbitrators; for if by the award of the arbitrators the debtors or wrong-doers be discharged or acquitted without making full recompense, the rest of the value will (as to other creditors) sit upon the executors skirts because it was their voluntary act thus to submit it to arbitrators. Thus may executors fall under prejudice, not only by wilful wasting or unfaithful miscarriage (wherein they are not to be pitied) but through incogitancy and unskilfulness also. Nay, I may say truly, that it is very hard for executors in some cases to walk safely: for besides that, to find out all judgments and recognizances by or against their testators is of some difficulty more than for statutes, whereof by search in an office discovery may be had: yet with this difference, that statutes-merchant and statutes

may be and stand effectual against ex-
 s, though not enrolled; albeit against pur-
 s of the conusor's land they be not of force,
 lect be of enrolment within three months.
 Here statutes or recognizances lie for per-
 ice of covenants upon sale or lease of lands,
 ge agreements, or otherwise; how hard is
 exccutors to know whether any covenant be
 r or not? How hard, to be sure, they find
 t bonds, bills, covenants, and articles in
 g, made and kept by others, whereby any
 is due and payable before debts by con-
 or legacies, as also all promises or debts by
 et payable before legacies? For the law
 prescribed no time for their claim and de-
 : and whether some such thing or mean of
 ation were not fit to be enacted, let the
 us consider. To attain to this knowledge
 testator's debts, I remember that it is by the
 Brook reported, that in King Henry the
 1, his time, Sir Edmund Knightly, being
 or to Sir William Spencer, made proclama-
 n certain market-towns, that the creditors
 t come by a certain day, and claim and
 their debts; but he for this was committed
 Fleet, and fined. For that none may make
 mation, saith the book, without warrant or
 ity from the King, except mayors and such
 govornors of towns, who by privilege or
 a may so do. But the dangers are only
 there is not sufficient of the testator's goods
 hannels to satisfy both debts and legacies.

For where there is so, the executor is not in any such hazard as aforesaid. This descry of danger may breed caution; and *qui timet et cavet, vitant* (1).

As to the second, we shall have in consideration two sorts of persons, viz. First, his executors, there being many times divers executors, and the waste or devastation done but by one. Secondly, the executor's own heirs, executors, and administrator, viz. whether, he dying, this act shall fix upon them like charge and burthen for satisfaction, as upon himself should have lien in case he had lived.

Touching his companions, though all together make but one executor, yet the misdoing of one shall not charge the rest, nor make their goods liable to recompense; as both appears by the book of Entries, and was also held in the time of Henry the Seventh, Anno 12 of his reign. Yes, of the opinion were the judges twice in the late Queen's time, viz. first, a case between *Waller* and *Sutton*, in the Common Pleas, and shortly after in the King's Bench, in a case between *Hankeford* and *Metford*, though these two cases be not reported in print. And surely this stands with rules of reason or justice, that each should bear his own burthen. If it were otherwise, many

Lib. Intrat. fol. 327. Kelw. Rep. fol. 23. So 11 H. 6, 38, a. 4 El. Dy. 2. 10, a. the writ so issued against the waster only. P. 4 H. 8. Rot. 303. Tr. 34 El. Pas. 36 Eliz.

(1) But if he personally promise to pay a debt, he makes it his own debt, and will be liable (2 Brod. & Bing. 460; Yelv. 10; 1 T. R. 691; 7 T. R. 453); and may be holden to bail on such promise. 1 Lev. 39; 1 T. R. 716. But see the provisions of 9 Geo. 4, c. 14.—(E.)

decline and abandon executorships, as very
 ous to the most honest and faithful, in case
 ere subject to racking by the miscarriage
 r colleagues.

for the executors or administrators (a) of the
 g executor dying before he have borne the
 n of his misdoing, I have found contrary
 ns, even in the late Queen's time : for first,
 Exchequer, it was conceived to be as a
 s dying with the person, as coming within
 le, *actio personalis moritur cum persona*.

administrator, *ab administrando*, in our common law,
 for him that hath the goods of a man dying intestate
 ed to his charge by the ordinary, and is accountable
 same, and to answer debts and legacies as executors,
 alue of the goods of the dead, and no further, unless
 his own false plea, or by wasting the goods of the
 nd if such administrator die, his executors are not
 rators, but it behoves the ordinary to commit a new
 ration.

person will administer, the ordinary may grant letters
pendum bona defuncti, and thereby take the goods of
 state into his own hands, wherewith he is to pay debts
 cies so far as the goods will reach, and thereby he
 , liable in law as executors or administrators. But
 hath a letter from the ordinary *ad colligendum bona*
 , is not administrator, but the action lieth against the
 , as well as if he take the goods into his own hands.
 executor of an executor liable in equity for any waste
 g done by his testator, though not at law, being con-
 as a personal tort. 2 Ch. Ca. 217 ; 2 Mod. 293 ;
 303, Mich. 31 & 32 Eliz. ; Tr. 34 El.

ecutor, who was suggested to have wasted the estate,
 l to give security for a legacy. *Duncomb*, an infant, v.
 r of *Stint*, Hil. 2 Car. 2.—(C.)

But in the said case of *Walter and Sutton*, the Court of Common Pleas was of contrary opinion, viz. that this was not escaped by the death of this misdoer, but the law would pursue his executors or administrators, and lay upon their backs the burthen of recompense or satisfaction; for that the testator or intestate, during this wrong, had made himself to be debtor in the first testator's stead, and therefore they who represent his person must with his goods make amends and supply. And this later opinion was something in time after the former. Also, between these two times, was there an opinion in the said Court of Common Pleas, agreeing in part with this later: for there a judgment being had against an executor, and the sheriff, upon the *fieri facias*, returning that there were no goods of the testator's in the executor's hands, and then this executor dying, a *scire facias*, upon a suggestion of devastation by the said executor deceased, was awarded against his executor, and that upon good debate, and show of a precedent left, and reported by *M. Jenner*, in King Henry the Eighth, his time. And it was then said to have been clear, that if a devastation had been returned in the lifetime of the said wasteful executor, his executor then should have been charged. All the doubt was, for that here that was not done in his lifetime, yet at last affirmatively (as above is showed) the resolution was.

Touching the third point, viz. to whom the advantage of wasting shall accrue, or who by

Tr. 34 Eliz.
Mich. 32 & 33
Eliz.

That none of
our estates
are at present
in good state
and health, but
may be altered
and sold by our
children, and
others, and the
profits thereof
may be spent
in other ways
than for the
benefit of the
family.

thereof shall charge this wasting executor: in the case the testator stood indebted to *A.* by statute, and to *B. C.* and *D.* by specialty, not by bond, bill, &c.; and the executor had no more in assets than only 100*l.* and this being due to *D.* he payeth him the whole not having any thing left to satisfy any of the other creditors: hereby wrong is done to *A.* who was a creditor by statute, and where he only shall make this executor to pay the sum out of his own goods, since as to him this is a devastation, for that it was at his own to pay off the other creditors which he had no suit being commenced by any of them; presently no wrong was done to *B.* nor *C.* if no such debt had been by statute, but all the other creditors by specialty, and *A.* only had commenced suit, and that known to the executor; after he paid all to *D.* he stands only as to the sum in his own goods, and not to *B.* nor *C.* if the executor had only paid a legacy or a debt by contract, leaving nothing for satisfaction of the debts by specialty, then had he stood equally liable to each of the other creditors. *Capiat per potest, viz.* he who first could recover, the voluntary act of the executor could oblige, must be preferred, if the sum would not go farther; for it shall by this mispayment, conversion, stand with the executor as if he had not paid it nor departed from it at all upon the matter; and therefore I doubt not but it is free for him to give the advantage of this his error

If upon fully administered pleaded to one, or vel aliter, he have the advantage of this devastation, taking up the whole sum wasted, quæritur how the executor shall relieve himself against another?

to which creditor by specialty he will, so as he shall stand free from all the rest, no surplussage remaining, nor any creditor of record being: for if there be any debt upon record, the executor sued by a creditor upon bond may, notwithstanding this his wasting, plead in bar of this suit, that there is such a record of a debt not satisfied, and that he hath no more than that debt amounts unto, and so admit so much still in his hands as he hath misadministered, though in kind it be not in his hand, but misspent, or unduly paid, as aforesaid. And what is before showed of the statutes precedency before bonds, in taking the advantage against an executor for devasting or wasting, the same is to be understood of precedency of judgments before statutes, and debts to the King before judgments, &c.

As touching the fourth point, *viz.* how far the executor thus wasting shall incur damage or make his own goods liable, doubtless no farther than the value of testator's goods wasted or misadministered. Therefore, if one have advantage thereof to the full sum, no other after shall, for he is no farther a trespasser or wrong-doer, nor is the testator's estate any farther or deeper damaged. And as damages for trespass are to be proportioned to the value of the wrong done and loss sustained; so also, in this case, the executor by his misdoing doth not draw upon himself his testator's whole debts, but so much only as the goods amounted to which he did misadminister, and which should have gone to the payment of

debt, if he had not so misguided
office of executorship, which de-
r or make good (1). And this
me proved by the case in
bird, where the value or
cially of the goods ad-
gh there by a wrongful
se it was expressly
uld answer for so

41 Ed. 3, 31.

o Guildhall, after
sted the goods of the
, and the defendant his ex-
e charged for the assets? was the
e held, that it was a personal wrong,
on him that did it; but upon the importunity
nders, of counsel for the plaintiff, he permitted it to
nd specially; and in another term it was adjudged
fing to the opinion of Hale *per tot. cur.* Lev. 2 p. 110,
v. *Collins*; see 1 Wils. 158.
in the case of an executor of his own wrong, it was
ad contrary. Lev. 2 p. 133, *Astry v. Nevil*.—(C.)

And where, having wasted, he becomes bankrupt, such
ayit may be proved under his commission. Whitm.
369; and 3 Meriv. 431. And if the husband of an
trix admits assets, and becomes bankrupt, they become
of the husband, and may be proved. 1 Sch. & Lef.

And if an executor (become bankrupt), having incurred
by false pleading, he cannot prove for them under his
mission. 3 Burr. 1368.
if an assignee of a bankrupt's estate, dying, his estate
ot be entitled to any dividends, on the proof of his debt,
the estate be fully reimbursed. 2 Med. 470.—(E.)

Pass. 36 El. in 6
Reg.

Now for the fifth and last point, viz. how and in what manner relief shall be had upon this point of wasting, for him to whom it pertains: first, this is to be observed, that in case where the verdict passeth directly against the plaintiff, no devastation can come in question, for that no judgment being for the plaintiff, no writ of execution can issue; and herefore, if upon the issue of fully administered, it shall appear there hath been a devastation, which causeth assets to fail, then must the jury find that the defendant hath assets, and not find a devastation, as was resolved in the King's Bench in the late Queen's time, between *Hankeford* and *Metford*: for there the jury finding a devastation, viz. a surrender of a lease for years left by the testator, it was held void and nugatory, and was not regarded by the court, which said that must come in by the sheriff's return; viz. upon the *fieri facias* (1). Thus assets being found in the executor's hands, judgment is given for the plaintiff to recover his debt, and to have it levied of these assets (2): nor is this finding of them by a jury against truth, though they be wasted; and so not to be had in kind; for the executor had them in right, since he hath not rightfully parted from them; according to the rule *pro possessor*

(1) A bare suggestion of a devastavit is not sufficient, but the oath of the plaintiff is necessary. 3 Bac. Abr. 101; Crompt. Pr. 101.

(2) And, upon such finding, he may be required to put in special bail. Comb. 206; 1 Sid. 63.—(E.)

hætur qui dolo (or injuria) desinit possidere. As the case first put, this wasting can not come in question for want of a judgment for the plaintiff; also where the judgment itself extendeth to the executor's own goods by reason of some false plea, hereof we shall after consider: for since that the consequence and effect of a vastation is but to make the executor's own proper goods liable to the debt of the creditor, this is altogether needless where the judgment itself hath laid hold of his goods. But now in case where the judgment extends only to the testator's goods in the executor's hands, let us find the way to relieve the creditor, and ease the testator's goods be wasted by mis-administering or otherwise; for hereabout the right hath often been missed, and again easily may be. In the latter end of the late Queen's time, a course was taken, viz. the sheriff returning generally, that the executor had no goods, a surseam was entered, that the executor had converted to his own use the testator's goods, whereupon a writ was awarded to the sheriff to inquire thereof by jury or inquest, which he did, and returned, that it was found that the executor had wasted the goods; and thereupon a *scire facias* was awarded against the executor, to show cause why execution could not be of his own goods; and upon two writs returned, execution was so awarded: but a writ of error was hereupon brought. And although it were said, for defence of that course, that it was usual in the Common Pleas, and more honourable than the other course, where the sheriff

43 El. Pettifer's
Case, Co. l. 5,
f. 32.

So 9 H. 6, f. 9.
See Paston, 11
H. 8, 16. 36,
upon surmise
that A. hath
wasted, a fieri
facias may issue
against his goods
only, if so, &c.
So lib. Intr. f. 11.

only returneth the wasting, or is sole judge thereof, whereas here it was found by an inquest of jurors, and thereupon a *scire facias* awarded; yet did the Court resolve the contrary, and reverse this execution as erroneous: for it was said, that upon the sheriff's return of *nulla bona*, viz. that there were no goods of the testator to be found, the plaintiff should have a special writ of *feri facias*, willing the sheriff to levy the sum recovered either of the goods of the testator, or if it could appear that the testator had wasted the testator's, then to levy it of his own goods. And this way, as was said, the executor hath good remedy by action against the sheriff if without just cause he levy it of his goods; but the other way, viz. when inquest is thereupon taken, the remedy fails, since neither the sheriff doing according to the inquest can be punished, nor the jurors finding falsely are subject to any attain, it being no verdict upon issue joined, but an inquest of office, which excludeth also all challenge of jurors. And whereas that book mentions the sheriff's subjection to action only in case of his mis-feasance or doing wrong; I conceive that he is likewise suable for omission or non-feasance in this case, viz. for not levying the debt upon the executor's own goods, where proof is made of his wasting. And where the book mentions this *feri facias* to be in this manner upon the sheriff's return in a *scire facias*, doubtless the book therein is misprinted, and should be a *feri facias*; for in a *scire facias* the sheriff can return nothing but that he warned the party, or that he

othing whereby he may be warned. This then course there prescribed, that first a general *writ* go out, and that thereupon the sheriff generally, that the defendant hath no goods testator's, and that thereupon the said spirit is to issue (*a*). Yet in the beginning of a Queen's time, the verdict passing for the sheriff upon the issue of fully administered, the was not permitted to make such a general of no goods to be found of the testator's, as enforced by the court upon good advice—either to levy the debt, or to return a *devastavit*—and so it was done at last by the sheriffs of London, much against their minds, and thereupon went out a writ to levy the debt of the executor's own goods, first in London, and after in the county, upon a *testatum* that the executor had no goods there (*b*). And it was there said, that if goods could be there found, then the plaintiff might have a *capias* to take the executor's body

2 El. Dy. 185,
Woodward &
Chichester's
Case.

11 H. 6. f. 18.
28 H. 8. Dy. 3.
Yea Co. l. 6, f.
47, 48.

When judgment is given against executors, and the returneth *nulla bona*, &c. upon the *scire facias*, the plaintiff may have a special writ of *feri facias*, *scil.* That the sheriff levy the debt of the goods of the dead, *et si sibi non poterit*, that the executors have wasted the goods, *bonis propriis*. 5 Rep. 32, *Pettifer's Case*.—(C.)

Assets in Ireland, or elsewhere beyond the sea, may be proved by the jury where the action is laid; for the plaintiff if he will, suggest the being of assets in a foreign country, and this is usually done. See Lib. Intr. 11, action for a false return of *devastavit contra sacrum sui*, 28 H. 8.—(C.)

in execution, or an *elegit* for the moiety of his lands (a). But certainly I cannot find (except with a difference) how this course of enforcing the sheriff to do one of these two can be just; as neither could Justice Fulthorp in the time of King Henry the Sixth approve it. For a jury of one county may find assets in another county, as was resolved in the time of King Henry the Eighth, which, yet was understood of goods moveable, not of lands. This then thus being, if a jury of Kent find assets which be in London or Essex, how can the sheriff of Kent, where the action was laid, levy the debt recovered by or out of these goods? or, since he cannot, why should he be compelled to make a false return of a wasting, when the goods remain unspent and unwasted in another county? Why rather should he not be suffered to return according to truth, that there is nothing within his county or bailiwick whereof the debt may be levied, since even his oath tieth him to make a true return? Nor is this contrary to the verdict, finding assets generally; and this so returned upon a *testatum*, the process may be directed into the right county. But in the said case it was replied to the plea of fully administered, that there were assets in Essex, the action being laid in Middlesex, and yet, as it seems by

(a) In case against executors, although that they shall not find bail in ordinary cases, yet in special cases they shall find bail, as if it appear that they have wasted the goods, &c. Lev. 1 p. 39; & 1 T. R. 716.—(C.)

the book, the trial was to be by a jury of Middlesex, which, saith the book, may find the assets in Essex: but there the plea was demurred upon, and held a good plea; which proves, that although the transitoriness of the assets make them subject to the notice of a foreign jury, yet is it not like an act transitory, and not local, for that must be pleaded to be done in the place where the action is laid, though in truth not so. But had issue been joined upon the point, methinks it should be tried in Essex where the assets be laid; the rather for that perhaps they may be real chattels, viz. lands leased to the testator, or other lands of him appointed to be sold for payment of debts, which, as heretofore hath been held, a jury of another county cannot find. Besides, although such a foreign jury may find other moveable assets, yet is it at their election, they are not thereto compellable, as elsewhere is holden. Here then may be the difference, viz. that if the assets be found to be in the county where the trial is, there the sheriff of that county cannot return *nulla bona*, without adding that the executor had wasted: but if there be no verdict at all touching assets, judgment passing against the executor upon a demurrer confession, *nihil dicit*, or the like; there may the sheriff make such a return of *nulla bona testatoris*, without returning any devastation: and so also where the verdict either findeth assets generally, not finding in what place they be; or expressly findeth them to be in another county, as a little before we found

2 Ma. Bro. attaint, 104, & 10 Eliz. Dy. 271. Because local & fixed, otherwise held 3 Jac. in Com. Ban. Co. lib. 6, f. 46, 47. 22 E. 49, & 2 Ma. Bro. attaint 104. 18 H. 7. Kelw. Rep. 51, a. So held P. 31 E. in Scaccar.

may be done by a jury of London of assets in Essex (a).

In King Henry the Eighth his time, as a little after the case of Chichester is by the Lord Dyer reported, the sheriff returning upon the *faci facias* that the executors had no goods of the testator's, did add in the same return, that one of the two executors had wasted, and thereupon a *sci. fac.* was awarded against him; and upon *sci. fac.* returned, and default made, execution was adjudged, and awarded against his goods only. And this course of *sci. fac.* both the Lord Dyer (as elsewhere I find it reported) and Prisot, temp. H. 6, approved. But I am perplexed with doubt what plea the executor coming in upon the *sci. facias* could plead; for except his denial of wasting might be pleaded contrary to the sheriff's return, and put in issue, so as to cause a new trial after a former, perhaps preceding judgment, which I think would not be admitted, then his coming in is to little purpose, for aught I can

(a) So if the process for execution go into an another county than where the verdict found, as the difference was held in Scac. 31 El. 28, H. 8; Dy. 30, b.; Pas. 4 H. 8, Rot. 303; 4 El. Dy. 210. But 3 H. 6, 12, without any *sci. fac.* upon the *devast.* returned, a *cap.* was awarded by the court; and see 9 H. 57; Bro. Ex. 57, & Lib. Intr. 320; a *sci. fac.* absolutely, and without condition. So 9 H. 6, 49, 50, a manuscript report; 36 H. 6, 3; and Mordant, 12 H. 7; Kel. Rep. 24. But Vavasor, justice, and all the other Sergeants *contra.* 2 El. D. 185.—(C.)

conceive. Here again it must be observed, that in the case of *Chichester* the judgment was had upon trial of fully administered ; but in the other case, in the time of King Henry the Eighth, it was upon confession ; which is all one, as I take it, with condemnation upon demurrer, or *non sum informatus*, or trial upon *non est factum* to the bond, or a release to the testator, or the like. Now between all these and that of *Chichester* there is a broad difference ; for there the defendant being convinced by verdict to have assets, which, if they continue not in his hands in kind, must be answered out of his own goods as wasted, therefore the *fieri fac.* to levy the debt of the testator's goods if any found, or in default thereof out of his own goods, is very agreeable and pursuant ; but in none of the other cases is there any such trial or conviction of the defendant's having assets, so as it rests *æque dubium* whether they have assets or not : and therefore it may seem somewhat hard and harsh to send out such a writ in that case ; and so should I have thought if I had only seen the report of *Pettifer's Case*. But looking into the record, and finding the condemnation there to be by *nihil dicit* in effect, I cannot uphold any distinction of course in respect of the said difference of cases. Nor indeed doth that course directed presume that the executor either hath assets, or hath wasted them, but commands, that if assets, &c. then the levying shall be one way ; if wasting, then another way : so if neither, *nihil fendum*.

Co. l. 5, f. 31.
Mich. 41 El. Rot.
2. 4. Co. l. intr.
266, b. A recovery of debt precedent was pleaded : Pl. replied, nul tiel record, and defend. would not maintain his plea. Ideo condemp. If neither, he must so return, and do nothing.

Where the husband surviving the wife may be charged in equity upon a *devastavit*, *vide* 1 Lutw. 670, upon equity of the stat. 30 Car. 2, see Salk. Rep. 310.

CHAP. XIV.

OF AN EXECUTOR OF HIS OWN WRONG.

TO begin with some definition or description of this man; he is such as takes upon him the office of an executor by intrusion, not being so constituted by the testator or deceased, nor for want of such constitution, substituted by the ordinary to administer. Touching whom we will consider in these parts, and with this method, *vis.*

1. What acts or intermeddlings of such a one, not being executor nor administrator by right, shall make him become an executor by wrong, *vide* five more, per stat. 43 El. cap. 8.

2. In what manner and by what name such shall be sued, especially when another than he is executor or administrator, or himself after such act becomes administrator.

3. How far he becomes liable to the creditors, and how, and to whom.

4. What acts done by him shall stand firm as if he had been an executor by right.

5. See a late stat. 43 El. cap. 8, hereabout.

As to the first, it was in the time of Queen

doubted, and not resolved, whether the seizing and taking into one's hands the goods of the deceased did make one executor of his wrong, without any farther act(1). And in

1. Point 1 & 2
P. & M. Dy.
103, b.

What acts constitute him such, see enumerated in ph. 91. It seems that the slightest act or intermeddling with the testator's goods without authority, is sufficient to constitute him an executor *de son tort*. 3 Bac. Abr. 20. 30; n. Abr. 210; 20 Swinb. 6, s. 22; *Padget v. Priest*, l. 100; *Edwards v. Harben*, Id. 587; 1 Wightwick, 16. milking cows, or taking a dog of the intestate, is tantamount. Dyer, 166, b. It seems, however, decided that juries are only to establish the facts; it is for the court to decide upon a question of law, whether the facts found constitute the party such an executor.

Where one acts under a power of attorney from a rightful executor, he cannot be charged *de son tort*; but otherwise if he continues to act after the death of such executor, for his liability is thereby determined. *Cottle v. Aldrich*, 4 M. & S.

When one acquires no interest in the intestate's estate, it would be to let him take advantage of his own wrong. He, therefore, maintain no action in right of the intestate. 39, pl. 25; 11 Vin. Abr. 215. 222; 12 Mod. 471; Vms. 583; nor retain even against a creditor of an inferior degree. 5 Co. 30; Moore, 527.

Where he had originally a lawful possession and authority, but has been since determined, it is doubtful if he can be considered as where he is appointed *durante minore etate, deute lite*. 11 Vin. Abr. 98; 1 Sid. 57; *sed vid Cottle v. Aldrich*, 4 M. & S. 175, *supr*.

Where he exceeds an authority delegated to him, as the case of letters merely *ad bona colligenda*, and he proceeds therein, it is said he thereby makes himself executor *de facto*. 4 Burn Eccl. L. 241; 11 Vin. Abr. 87.

Administrators *durante absentia, minoritate, or pendente lite* have not an unlimited authority to sell or alienate, but

1 El. Dy. 166
& 167. So also
Belkn. 50 Ed. 3,
9.

13 & 14 El. Dy.
305, 306. 1 El.
Dy. 166 & 167.

the beginning of the late queen's time the Lord Dyer said, that the possession and occupation of or meddling with the goods is that which gives notice to creditors whom they are to sue as executor. But doubtless creditors must look farther before suit; for else can they not know whether he so intermeddling be executor or administrator; nor consequently how to found their suit rightly and safely for good success; since a suit against an executor as administrator, or against an administrator as executor, will prove ruinous, and fall to the ground. Yea, where an administrator, sued as executor, did not plead that administration was committed unto him, but generally denied that he was executor, or administered as executor, the Lord Dyer held that it must be found for him, yet left it doubtful; but the clear and safe way had been to have pleaded the administration, &c.; and in the former case the Lord Dyer said, that one intermeddling only about the funeral and laying out money therefore, an overseer or conductor, or he who hath letters of the ordinary *ad colligend.*, viz. to get

only in cases of *bona peritura*, or to recover debts which might otherwise be lost, or do other such act which cannot be delayed without prejudice to the estate. 3 Bac. Abr. 13; 11 Vin. Abr. 102; 1 Roll. Abr. 888. 910; Com. Dig. Adm. F. 5; Co. 9, 29, b.; 3 Leon. 103. 278; Cro. Eliz. 7, 8; 1 Anders. 132, pl. 78; Godb. 104; Hob. 250; 2 Brownl. 83; 1 Salk. 42; 2 P. Wms. 576; and 2 Ves. & B. 97. It seems too, they may retain for their own debts. Raym. 483; but see *Coulter's Case*, 5 Co. 30, and Cro. El. 630.—(E.)

d kept the goods in safety, and he who intermeddled by virtue of a will truly made, but controlled by a later will after found and proved, may free himself from being an executor of his own wrong, by special pleading how or in what manner he intermeddled, and traversing his administering in other manner: and that this traverse need not, nay, may not be, was held in the time of King Hen. 6, and 7, for that such acts amount to no administering at all; and where no administering at all is confessed, such a traverse of not administering in other manner is dissonant, and not legal. But let us look back upon these several points exempted by the Lord Dyer, and we shall see some cautions necessary touching executors and their safe entertainment. First, as touching the point of burying the dead, it must

12 H. 6, 28.
10 H. 7, 28.
Yet lib. intrat.
321, b. where
he confessed
about funeral,
he traversed
aliter lib. intrat.
321, where by
letter ad collig.
he traversed,
absq. hoc quod
et ex.
21 H. 6, 21.

understood to be with some expense of the deceased's goods, and so it is expressed in the old book of Henry the Sixth his time: else for a man out of charity to lay out of his own money in intermeddling with the goods of the deceased to bury a friend, hath little colour to involve him in doing in an executorship by wrong^(a). Taking this case, then, that such person lays out or expends, of the deceased's goods or money upon his funeral, heed must be taken touching the measure, and proportion whereabouts. Though I can give no particular and distinct limit, yet doubtless either by necessity, viz. church duties, &c. or at least

(a) 4 Ves. jun. 216.

decent suitableness to his quality; must be the bounds. And herein to speak as I think, this latter must either be utterly excluded, or held within very narrow compass: for what reason that a knight or man of higher quality, leaving (though perhaps entailed lands of good value) yet goods not sufficient to pay his debts, should have an hundred pounds or more of that which should satisfy creditors, spent in pompous interring of him, for his worship and reputation? Next, overseers may only be excused for seeking to preserve and keep the testator's goods, not in case they expend or dispose thereof. So also for him who is authorized by the ordinary to collect; for if he sell or dispose of any (though goods otherwise subject to perishing) it makes him an executor by wrong, as was resolved in the late Queen's time, notwithstanding that by the ordinary's letters he was expressly directed or warranted so to do; for it was said, the ordinary himself could not do so. As for him who administered by virtue of a will after disproved, or controlled by a later, he must not doubtless stand free for the goods before administered, but, either as rightful or wrongful executor, stand liable to the creditors (1). Nor

Lib. intr. 322.
8 & 9 Eliz.
Dyer, 255, 256.
He sold blended corn, but pleaded not the special matter.

(1) If the rightful representative bring his action against such an one, if in trover, it seems that upon the general issue payment of debts, &c. to the full amount, will be a good defence; for the nature of the action admits the first possession to have been lawful, and the due disposition negatives a fraudulent conversion; but if he still have the actual goods in his custody, though he hath paid debts to the value

doth every such intermeddling by one out of all these excuses and evasions as would be an administration, make one an executor by wrong. If one do but take a horse of the deceased, and tie him in his house or stable, this makes him not an executor, saith Paston, justice, all like acts or intermeddlings; as he that delivers to the wife of the deceased her apparel, at least if it be no more than is convenient to her degree. But if she take, or another deliver more than such to her, she or he becomes an executor by wrong. But now let us come to a difference, where there is a rightful executor, and a will by him proved, or administration committed; for there such light acts or intermeddlings shall not make one an executor by wrong, as where there is no other of right to be sued. As if one take goods wrongfully from such a right executor, this (though he convert them to his own use) makes him not an executor by wrong, but a trespasser to the rightful executor or administrator (1), who even for these

1 & 2 P. & M.
Dyer, 165.
21 H. 6, 28.

3 H. 6, 32.
1 El. Dy. 166.
Tr. 37 El. by
Fenner, Just. if
one do any such
act as pulls the
property out of
the executor, he
is become an
executor by
wrong.

When only a
trespasser.

hereof, it seems he cannot justify the retainer. 5 Co. 30;
2 Bro. El. 630.

So if a creditor take out administration, he may recover his debt against such executor, as well as the other goods so disposed or taken by him previous to such grant. Sty. 384;
Com. Dig. Adm. c. 3.

If the action be in trespass, inasmuch as this goes at once to the original unlawful taking, the due disposition of the effects is no answer, but only in mitigation of damages. Law of Nl. Pri. 48. 91; 12 Mod. 71; Ca. B. R. 441.—(E.)

(1) But it seems a man cannot be such where he enters on

If the goods be aliened by fraud, he who takes them after the executor's death is an executor by wrong. Tr. 37 Eliz. D. 5 E. 4, 73, a. Tr. 2 Ja. in Com. B. Co. l. 5. 33, 34.

goods, once assets in his hands, stands liable to suits of creditors, they being neither lawfully evicted nor rightly administered: but in case there had been no executor at that time, or no will proved, nor administration committed, then such taking of the deceased's goods into a strange hand had made an executorship by wrong. And thus was the difference lately resolved, as is reported by the Lord Coke, in the case between *Read and Carter*, in the Common Pleas.

1 Eliz. D. 160, b.

7 H. 5, 20.

Vide P. Swinh. 6, s. 22.

Yet this farther difference was there held, viz. that although there be an executor or administrator by right, yet if a stranger take upon him to receive debts and make acquittances, or to pay debts, claiming to be an executor, he is suable as an executor by this act: and so also in the late Queen's time was held by six justices, as touching the receipt of debts and making acquittances; but the book mentions not whether any other executor than were, or not. But in the point of bare payment of debts, Frowick makes another difference, viz. if a stranger do with his own money pay the debts of a friend deceased, and not with the debtor's, this is but an act of charity, and makes him not an executor by wrong; otherwise, if with the debtor's money. Yet to this

lands generally, and seeks after to qualify what amounts to a disseisin, by the character of an executor *de son tort*. He is, in fact, a trespasser, and may be sued as such by the rightful executor or administrator. 5 Co. 33, b.; Salk. 313, pl. 19.—(E.)

another difference must be added, *viz.* that if he thus paying with his own money, have taken into his own hands goods of the deceased, then is his payment presumed as by or out of the value of these goods, and so makes him an executor by wrong; contrarily, if he have no such goods in his hands. And in the point of intermeddling with and disposing of the testator's goods, where another executor is, this farther difference is to be added or understood, *viz.* that where the goods so taken never came actually to the executor's hands, but were in a remote place, there this taker becomes executor. For as it were mischievous to the executor, if he should, by a possession in law cast upon him, stand chargeable with these goods in remote places purloined, as assets in his hands; so were it as mischievous to creditors, if neither executor by right, nor this stranger as an executor by wrong, should stand liable to creditors for them. It is true, that the right executor may sue and recover damages for them, and that so recovered shall be assets; but the creditor hath no mean at the common law to enforce him to sue, and perhaps it may be a cold suit. And with these additions, I think that late resolved difference may stand firm and sound. Yet in former times, without such difference, the taking only and possession of the goods of the deceased was held to create an executorship by wrong, as Belknap said in the time of King Edward the 50 E. 3, f. 9. Third; and especially if the act were such as removed the property of the right executor, as Tr. 3 Eliz.

Justice Fenner in the late Queen's time said,
teste meipso.

*How, and by what name, suit shall be against such,
and the like.*

2 Point.

L. 5 E. 4, 72.
Co. lib. 5. 30,
31 & 32, b.
21 H. 6, 8.

Vide Coke, lib.
5, 2 p. f. 33, b.
Reade's Case.

Co. lib. intrat.
154. But 145, m.
in the verdict he
is called exec.
de injuria, sua
propria.
39 H. 6, 45, 46.
21 H. 8, 8, 19.
9 E. 4, 14, 15.
1 & 2 P. & M.
Dyer, 165.
33 H. 6, 38.

23 H. 6, 31.

TOUCHING the second point, *viz.* in what manner suit shall be against such: first, in general, this usurping executor is not in suit to be distinguished by name from the right executor, but to be sued generally by the name of executor of the last will and testament of the defunct(1); and then if he will deny himself so to be, he must plead that he neither is executor, nor hath administered as executor. Then the plaintiff must prove that he hath administered in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right executor, and yet another doth administer by wrong, it is at the election of creditors either to sue them jointly together, or one or both of them severally and by himself. But if where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such a receiver that power from the ordinary can so be: therefore

(1) He can only be charged as executor generally, whether he be a rightful or a wrongful executor, for there is no other form. 5 Rep. 31, a.; 1 Mod. 208.—(E.)

in that case there is a necessity of suing him apart and by himself (who so usurpeth administration) by the name of an executor.

So if *A.* administer the goods of *B.* not being executor nor administrator, and after his such doing and disposing of the goods, he obtaineth administration of the goods of *B.* but the goods left or coming to his hands since the administration committed suffice not without the other debts received or released, or goods sold before, to satisfy creditors: now if any sue *A.* by the name of administrator, he shall have no farther relief than according to the value or extent of the goods left in or come into his hands since the administration committed; and if those be fully administered, he shall get nothing; if they remain administered, ~~but~~ amount not fully to his debt, he must want so much of satisfaction; and if he will be relieved or satisfied out of the goods before disposed of, he ~~must~~ sue *A.* as executor of *B.* And so was it ~~ruled~~ and resolved by Gawdy and Shute, justices in the King's Bench, in the late Queen's time, *viz.* Tr. 30 Eliz. And if this now administrator will plead in abatement of this action, that administration was committed to him, and demand judgment, if suit shall be against him as executor, ~~then~~ the plaintiff must in the replication, as I take it, set forth the special matter, *viz.* how the defendant did administer before administration to to him committed (1). But if one to whom ad-

§1 H. 6, 8. If the administration were committed before the suit began, the writ shall abate, else not, as was of old conceived. *Stubbs v. Rightwise*, Trin. 30 El. Cro. El. 102. Jud. that defendant ouster.

(1) And it is a good replication that defendant is executor

ministration is committed do devast, and this administration is by suit repealed, because he was not the next of kin, and administration is committed to another; now a creditor who would be

de son tort; for he cannot retain for his own debt as such, otherwise the creditors of the intestate would be running a race to get possession of his goods without obtaining administration thereto. Yelv. 137; 2 Saund. 265, n. 2.

But where such an executor, *pendente lite*, obtains administration, he may rejoin that fact by way of plea, *per darrein continuance*, and justify thereby the retainer in his plea. 2 Stra. 1106.

And such an administration, subsequently granted, will legalize such acts as were tortious before. 2 Vent. 180; Sty. 337.

So it vests the same interest in him as in other administrators, and shall relate to the time of the intestate's death. 11 Vin. Abr. 214. 217; 3 Bac. Abr. 25; Moore, 126; 13 Mod. 471; 3 T. R. 590; 2 H. Bl. 26.

Where a creditor has brought an action against one executor *de son tort*, he may, under the plea, *plene administravit*, show either a subsequent grant, which shall make his former acts valid, or a grant to one under whose authority he may have acted, or that he has delivered the assets which came to his hands over to the rightful executor. 1 Salk. 313; Moore, 126; Cro. Car. 88.

But after action brought, such a delivery over of the effects or assets of the rightful representative, is not an available defence. 3 T. R. 587; 2 H. Bl. 26.

And where a widow redelivered goods to a creditor, in satisfaction of his claim, and did no other act by which she could be charged *de son tort*; held, that the creditor could not protect his possession against the rightful administrator, he having himself participated in the wrongful act by which he obtained possession. *Mountford v. Gibson*, 4 East R. 441.—(E.)

relieved out of the goods wasted, must sue *that* first as administrator, and not as executor of his own wrong, said Popham, chief justice, for he did rightfully administer for that time. Vid. s. 155.

As for the third, *viz.* how far this executor of his own wrong becomes liable and obnoxious to suit; consider we these things. 3d Point.
How far liable
to creditors.

First, He becomes subject both to the action of the executor, who hath right to the goods wrongfully intermeddled withal by him, though it were before proving of the will; and also to the action of the creditor, who hath right to the satisfaction of his debt (a) (1).

Secondly, As touching the measure how far he is engaged, doubtless he is not by his wrongful administering become chargeable with the whole account of the testator's debts; but only so far, and with so much thereof, as the goods which he so wrongfully administered amount unto (2). (Yet

(a) Executor of his own wrong may be of a term, and shall be charged in waste. Lev. 3 p. 35, *Major et Com. de Norwich v. Johnson*, Mich. 33 Car. 2.—(C.)

(1) This kind of executor is equally liable to be sued in the Ecclesiastical Court for a legacy, in respect of assets which have come to his hands. 4 Bac. Abr. 448.—(E.)

(2) And where he gets possession of a term, as he may do, he may be charged for waste committed in respect thereof; or if he be convicted of any other devastavit, he is liable, *de bonis propriis*; and by stat. 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 24, his executor is made chargeable for such waste by

Co. lib. intr.
144, 145.
Plus de hoc.

¹ El. Dy. 167,
c. 12.

he must look to his plea, else by it he may draw all sued for upon himself; as if he deny his being executor or administrator.) And this seems to be proved by the case in the time of Edward the Third, where the inquest found not only the administering or intermeddling by the executor wrongfully, but found also, by direction of the court, (as it seemeth) what the value was of the goods so wrongfully administered, which had not been material, if the administering of a penny had made one as far chargeable as the administering of a pound. Besides, if it be so, that a rightful executor wasting goods of the testator to the value of 20 l. shall be no farther charged than *that* value, then doubtless so shall it be also in this case, for both be wrongful administrations: only this difference there is between them, that in one case the administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord Dyer doth not stick to call him who administereth wrongfully, or in undue manner, expressly an executor by wrong, in the case of *Stocks* against *Porter*, though he were rightfully executor, because he did dispose or execute wrongfully.

his testator. 3 Lev. 35; Com. Dig. Adm. I. 3. But this rule cannot be extended to charge the executor *de son tort* of an executor *de son tort*. Andr. 252; 3 Bac. Abr. 100, n.

But it seems, upon the plea *plene administravit*, he shall not be chargeable beyond the assets which have come into his hands (Dy. 166, b. in margin; 3 Bac. Abr. 25; 5 Co. 30; Carth. 104; Sid. 76); but to this extent, it is said, he may be compelled to pay. *Ibid.*—(E.)

As to the fourth, viz. What acts done to him or by him who is an executor of his own wrong shall stand firm and good, as done by or to the right executor(1): suppose, first, that the deceased were indebted to him 20*l.* who thus usurpeth executorship, whether may he pay himself or not? And this point was in debate in the King's Bench between *Coulter* and one *Ireland*, executor of *Hunt*; where it was strongly objected, that notwithstanding the rightful executor or administrator might punish him, and recover against him, for the goods which he administered; yet another creditor suing him as executor generally, and so affirming him to be, (for there is no special form of a writ or declaration to distinguish an executor by wrong from a rightful executor,) he stands as against him in the state of a rightful executor, and therefore may first pay himself before he pay others: and of that mind, at the first, where *Fenner* and *Gandy*, justices; yet did they admit that this payment should not stand good as against the rightful executor or administrator (a). And Pop-

4 Point.
What acts of his
of force.

M. 40, 41 E.
Co. l. 5, f. 30.
Mich. Cro. El.
p. 630.

(a) An executor of his own wrong shall not retain, for thereof will ensue great inconvenience. — *Coke's 5 Rep. 30.* *Coulter's Case*; Cro. El. 630.

Executor of his own wrong may not retain to pay himself, for then every creditor would contend for it; and it is not reasonable for any to take advantage of his own wrong. And the law of God saith, *Non facias malum ut inde fiat bonum, et melius est omnia mala pati quam malo consentire.* *Ib.*—(C.)

(1) Where such an executor subsequently takes out letters

ham and Clinch held strongly, that neither should it stand good against other creditors ; for then every man would rush upon the testator's goods, and be his own carver in payment. And whereas it was said at the bar, that the Lord Anderson, upon an evidence at Guildhall had ruled it otherwise. Popham, at another day of debate of the said case, related that the Lord Anderson did deny that he ever so ruled, or was of that opinion, and farther, said that both he and Justice Walmsley, Periam and Clark, barons, did agree with Popham and Clinch in opinion. After which, Justice Gaudy, as also Fenner, if I mistake not, changing their opinions, and concurring with the rest, judgment was given accordingly. In the debate of this case question was made, if such an executor by wrong pay a debt to another creditor by specialty, whether this shall not stand firm and good, since he stands liable to creditors so far as the goods by him administered do amount. And it was agreed, by the better opinion at last, that this should stand firm and good ; so as if the payment were out of his own goods, he might retain to himself in lieu thereof so much of the goods of the testator ; for here he doth not, as in the other case, advantage himself by his own wrong. Yet that opinion, allowing this payment to creditors, must,

of administration, this legalizes all previous acts by relation to the time of the intestate's death. So it vests the same interests in him. *Supr.* 3 Bac. Abr. 25, 26 ; 2 Ventr. 179 ; 2 H. Bl. 26 ; 3 T. R. 590.—(E.)

as I think, be understood with this difference, *viz.* that this payment shall stand as against other creditors, but not as against the right executor or administrator: for then any stranger might usurp the office of executor and take from him that liberty and election, to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before others, in case there were a debt due to him, which were very unreasonable.

*Of addition and alteration by the Statute 43 Eliz.
cap. 8.*

WE having considered what the common law is and willeth in the premises, let us now see what alteration or addition a late statute hath made. In the last Parliament of the late Queen Elizabeth, consideration being had of subtile getting, into men's hands goods of an intestate by deed of gift, or letter of attorney, from one of small or no ability, to whom such subtile contriver hath procured administration to be committed, and so himself would stand free from the suit of creditors, the administrator himself either not being to be found, or not being of any value to satisfy creditors; it was therefore enacted, that every person receiving or having any goods or debts of any intestate, or any release or discharge of any debt or duty belonging to him upon any fraud, as aforesaid, or without consideration of or near the value, (except in satisfaction of some just and principal debt,

5 Point.

Executor of his
own wrong by
statute.

the value of the goods or debts due from the intestate,) shall be charged as executor of his own wrong, so far as the value of those goods and debts amount, deducting all principal just debts to him due, and payments by him made, which a lawful executor ought to have paid. Here have we a touch of all the parts precedent, or at least three of them.

1. We have first a new executor by wrong, though intermeddling under the title of an administrator.

2. We have a limit of the charge by him incurred, suitable to our former expression.

3. Lastly, we have to him an allowance of debts owing to himself, or duly paid to others; which is more than we have conceived allowable to another executor by wrong.

Salk. 313.

The taking of goods after administration granted, doth not make an executor of his own wrong.

CHAP. XV.

OF PLEAS BY EXECUTORS, AND WHICH BE BEST,
WHICH MOST PREJUDICIAL TO THEM.

SINCE amidst the pleas pleaded by executors there is such difference, as that some induce one kind of judgment, some another, some drawing

THE OFFICE OF AN EXECUTOR.

re, loss and burthen upon executors than others: us consider of the differences, so as light may taken to choose the safest or fittest for each e(a).

s) Every executor is an administrator of goods, and the iding is, *ne unques executor, nec unques administravit come* *utor*. And an administrator hath the office and quality n executor. 5 Rep. 83, *Snelling's Case*.

but if executor bring an action as administrator, he may barred as to the action of the writ: but yet mistaking of action is no bar nor estoppel to bring his true action. ep. 33, *Robinson's Case*.

n debt by executors, if one demandant or plaintiff be non-, and the other sueth forward, he who is nonsuit shall not merced. Coke's 8 Rep. 61, *Beecher's Case*.

assumpsit against executors upon a promise by the tes- r, who pleaded *non assumpsit*, upon which a verdict and ment for the plaintiff; and error assigned, that it doth appear by the plea (that the testator) *non assumpsit*; for not pleaded that the testator *non assumpsit*. *Cur. contra*, ill be intended the testator, for there is not any charge y assumption by the executor, but the testator only; atch, 125, *Baker's Case*, was cited, where in debt t executors upon the testator's bond, and plea, *non est*, adjudged *suum* should be intended of the testator, ve judgment affirmed. Lev. 1 p. 184, *Browning v.*

umpsit by the plaintiff, an attorney of the court, by and declared in *propria persona*, upon his privilege i *consuetudinem curiæ*. The defendant pleaded a re- ce not satisfied, and also a judgment in debt for upon a goldsmith's note, to be paid with interest and, and it was not paid till such a time after, and et amounting to 1,700*l.* the judgment against him 1,700*l.* and that he had not assets beyond 40*l.* to this recognizance and judgment; and upon he plaintiff had judgment *per tot. cur.* First, the

Plea denying
the executor-
ship, 21 H. 6,
19, 20. Bro. 62.
2 E. 4, f. 4. 19
H. 7, 15. Libr.
intr. 332, 333.
33 H. 6, 33, 34.

If an executor do utterly estrange himself from the executorship, saying, that he was never executor, nor ever administered as executor (for that must be added), then if the issue be taken upon the plea, and it be found against him, the plaintiff shall have judgment to recover, not damages only, but even the debt itself, out of the proper goods of the executor, if none of the testators can be found to satisfy it (a). And this shall be thus not only

declaration was ill, declaring by privilege upon original; for the privilege of attorneys is in suits by bill; but when they sue by original, they ought to declare as other persons in common, but that is only form, and remedied by the general demurrer. But secondly, the plea is ill, pleading a judgment for interest, which is a devastavit to permit it to run in arrear and then to suffer judgment for it; and want of assets to pay it before it incur by the administrator, shall not be intended, where not expressly pleaded. Lev. 2 p. 40, *Seames v. Dee*, adm. de *Everrad*.—(C.)

(a) Debt against the defendant as executrix to her husband: the defendant imparled, and then pleaded, *actio non*, because that her husband died intestate, and administration was committed to her; *absq. hoc*, that she is executrix, or at any time administered as executrix. Upon which the plaintiff demurred; and it was said for the plaintiff, that this plea is no other than a misnomer, which goeth only in abatement, and therefore is not pleadable after general imparlance; and it is not like to a plea of *ne unque executor*, which totally estrangeth him from the testator. Here she admits herself chargeable to the action, but in other manner, *scil.* as administratrix. To which it was answered for the defendant, that although that this plea doth not go to the right of action, yet it is to the action of the writ, as *Robinson's Case*, 5 Co. 33; and it is a bar to the plaintiff, so that he shall not at any

re it is found that the defendant was made executor by the will, and proved it, and so could choose but know it; but even also where he never proved the will whereof he was made executor, nor ever administered by virtue thereof:

though he did before the ordinary refuse to executor of this will, or to intermeddle with execution thereof; yet if any other named executor with him did prove the will, or did not refuse to be executor, let such other refuser take care of pleading that plea. For truth is against the first part of his plea, *viz.* that he never was executor; and so the verdict, which must be *verdictum*, must needs pass against him, and make his own goods liable as well to debts as to legacies. What if no other were made executor, *this* only who refused before the ordinary? he may safely plead that he never was executor? he may not, since he so was executor before his testator, that he might have released all debts due to the testator, and given away all his goods; before I think he must plead specially, showing refusal, and not generally deny his being executor. Nay, admit he never was once named,

He was unable
as soon as the
testator was
dead.

to charge the defendant as executrix, and so it is more in abatement, although that it is no bar to the right, and the plaintiff will charge the defendant, as he ought to be administered; but *per cur.* this plea is only in abatement, and therefore not pleadable, as here after general issue, for which they gave judgment for the plaintiff. *his casus et simile judicium eodem tempore inter Howley & Sibly*; Lev. 2 p. 190, *Granwel v. Sibly*.—(C.)

The plea of ne
uniques executor
is that he never
was executor,
nor ever admin-
istered as such.
Co. Ent. 144.
But if he did it
as administrator,
it is otherwise ;
yet see that speci-
ally pleaded,
Co. lib. intr. 148,
n. Lauu & Al-
dred.

See Co. lib.
intrat. Judg-
ment so entered.
145, b. Read &
Carter's Case,
Hill. 41 in C.B.
Rot. 401. De
bonis et cattalis
que fuer. præd.
(testator) tem-
pore mortis sum
in manibus
præd. def. ad-
ministrand. &c.
Si tantum inde
in manibus suis
habeat, &c. Et
si non habeat,
tunc debitum et
dampna præd.
de bonis et ca-
tallis ipsius def.
propr. levand,
&c. Reade's
Case. Ne un-
ques, executor

made, or intended to be made executor, yet hav-
ing pleaded this plea, that he never was executor,
nor administered as executor, if it shall be found
by verdict that he did administer or intermeddle as
executor, the same blow or burthen falleth upon
him : for then the latter part of this plea is found
untrue, yea the whole upon the matter, for by this
administering he became an executor of his own
wrong, and the denial of this executorship by
wrong or usurpation shall be as penal to him as
the denial of a rightful executorship. The like
law where the executor pleads a release made to
himself, or a payment of the debt, or other per-
formance of the condition made by himself. Nay,
I find in this latter case the judgment entered ge-
nerally against the defendant, as against another
for his own debt, not being executor. And the
reason why the law makes these so penal to an
executor is, because his plea is not only false, but
the falsehood thereof was wilful, since it must of
necessity be known to himself to be so. And
lastly, for that all pleas, if they had proved true,
had been perpetual bars, at least against the de-
fendant (a) : the first indeed had not been a bar

(a) *Indebit. assumpsit* against an executor for divers mer-
chandizes sold and delivered to the testator : the defendant
pleaded several judgments in actions of debt specified, due
by the testator upon simple contract, obligations against
himself *per non sum informat. prout patet per separalia recorda*
inde, which are yet in force, and that he hath not assets above
such a sum, which is not sufficient to satisfy the judgments,
and that he stood charged with them ; upon which the plaintiff
demurred ; and the case was argued at the bar several times,

against another, being in truth executor or administrator. But if the executor had pleaded a

pleaded. Co.
Lib. Intr. 29, a.
not first de bonis

and then judgment was given by the whole court for the plaintiff(1); and two exceptions were taken to the pleading: first, to the conclusion, *prout patet per separalia recorda inde*, to the said several judgments, where such conclusion ought to have been to each severally; and as it is pleaded it made a complicated issue: but *per Cur.* it is good enough, and shall be taken *reddendo singula singulis*, and the plaintiff might plead *nul tiel record* to each severally. Secondly, it is not said, that the judgments were had *pro veris et justis debitis*, as the use is, and principally in this case it ought to be; because the judgments are *per non sum informatus* in actions of debt which lie not against executors, and so there is appearance of collusion: but *per Cur.* it is good enough, for it shall come by plea on the other part; for if they were not *pro veris debitis*, the defendant might plead it, and put the plaintiff to prove the verity of them, or might plead fraud and covin, and put the plaintiff to prove the consideration. Thirdly, it was strongly argued by the defendant(2), that actions of debt will not lie against executors upon simple contract by the testator; and for that they admitted judgments against them in such actions, shall not have the advantage to plead those judgments which they might reverse when it pleased them, and that no other might be avoided or reversed in bar of just debts; for by such means, when they have barred the plaintiff of his debt, they might afterwards reverse those judgments, and have again or discharge the money to their own use. And to this opinion, Keeling, chief justice, inclined upon the first argument in Mich. term; but

(1) N. Judgment seems to have been given for the defendant, and this word, "plaintiff," seems to be a mistake in Levinz's Report.—(E.)

(2) *Quære*, if this word, "defendant," should not be *plaintiffs*, from the sense of the argument?—(E.)

testatoris &c.,
See Bro. Ex. 22,
these reasons

release made to his testator, finding such an one among his writings, which yet was either forged,

afterwards, *term. Pasch. prox.* he and Twisden, Windham, and Morton, all agreed that judgment should be given for the defendant; for although that they might have abated the actions, yet if they had so done, the plaintiffs might have charged them in other actions *sur assumpsit*, and so they would have put themselves to double charge, which they are not obliged to do when the debts are true and just, and in their conscience ought to be paid; and if they were not such, the plaintiff might put them to prove by pleading the verity of their debts, or by pleading of fraud, or traversing the truth of the debts, in which, if they fail, the plaintiff shall recover his debt, and no room for the suspicion that the plaintiff should reverse the debts and retain the money. And the old books, which hold that actions of debt lie not against executors upon simple contract, hold also that there was not other remedy: but the law is now otherwise, that although the debt upon simple contract may not be recovered against executors by action of debt, yet it may by *assumpsit*. 1 Lev. 200, *Palmer v. Lawson*.

Debt upon an obligation: the defendant pleaded a judgment against him as executor upon an obligation of the testator, but did not conclude *prout patet per recordum*, and pleaded divers other judgments well, and that he had fully administered *omnia bona testatoris præter* 10s. which are charged with the said judgments, and not sufficient to answer them. The plaintiff replied, *protestando*, that all the judgments were had by fraud; for plea saith, that on the day of the writ there was not more than 100*l.* due upon all the judgments, and that the defendant then had assets sufficient to satisfy the judgments, and also the plaintiff his debt, and that he permitted the judgments to remain in force to defraud him; upon which the defendant demurred generally; and now it was resolved by the Court: first, that this general pleading of assets sufficient to satisfy all the judgments and the plaintiff, was good: but then, secondly, the material part

or never both sealed and delivered by the plaintiff as his deed? or if he plead payment made by his

for this diff.
33 H. 6, 23, 24.
So of other per-

of the plea is the assets, and of that no *venue* is laid where he hath assets, as it ought; and therefore the assets is not triable, and that is an incurable fault. But then, thirdly, it was objected that the plea was ill, not concluding *prout patet per recordum*, of the first judgment. To which it was answered, that the fault of it is no other than a default of trial by the record, which is passed over by the replication which hath admitted all the judgments; but that the defendant hath assets *ultra* to satisfy them, which is no more than the omission of a *venue* for trial by the country, which is always cured by the pleading other matter over to be tried, which is the assets here, and of that *cur. adv. vult.* but after ruled it accordingly. Lev. 3 p. 311, *Knighton v. Morton*, ex. 3 W. & M. in B. R.

Debt upon an obligation against an executor: the defendant pleaded several judgments obtained against him, upon several obligations made by the testator, and that he had not assets *ultra*, &c. The plaintiff replied, as to an obligation of 200*l.* that it was upon condition to pay 100*l.* and so to all the others severally; and that the defendant had assets to pay the plaintiff, and *ultra* to satisfy the said lesser sums, *scil.* at such a place. The defendant rejoined, that he had not assets *ultra* to satisfy the debts and judgment in his plea. Upon which the plaintiff demurred specially, because the rejoinder did not directly answer the replication, but ambiguously. And now it was argued by Pemberton, that the defendant ought to have rejoined only, that he had not assets *ultra* to satisfy the said lesser sums, and not to make the penalties in the judgments parcel of the issue; for if he had assets *ultra* the lesser sums, he ought to pay the plaintiff. To which it was answered, and resolved by the whole Court, that the rejoinder was good; for the penalties are legal and due debts until they are satisfied, under which he might defend himself against other actions; for although that in equity and conscience the lesser sums were only due, yet

form. Co. lib.
intr. 153; and
6 E. 4, 1. 7 E. 4,
8. See Bro.
Ex. 22. That
the book con-
trarily reported,
34 H. 6, 22, 23,
is erroneous, as
was descried
by Fitz. & al. 23
H. 6, the record
being not so as
the book saith
the judgment
was.

testator; neither of these pleas found against him shall cause the judgment to fasten upon his own goods: so if he denied the bond or bill, whereupon the suit is grounded, to be the testator's deed. For in all these cases the truth being not known to him, he might honestly and reasonably conceive it to be as he did plead. But what if he plead fully administered, and this be found against him, which rested in his own knowledge? Shall not this false plea expose his own goods, in defect of his testator's, to the satisfaction of this debt? No, it shall not, for that though this were a false plea, and that within his own knowledge, yet was it not a perpetual bar; for if it had been so found as was pleaded, yet assets coming after to the hand of the executor, the plaintiff should then

perhaps the plaintiffs in them will not accept the lesser sums in satisfaction of the judgments without suit in equity; and if they would, or offer to accept the lesser sums, and the defendant will not pay them, the plaintiff may help himself by another manner of pleading, *scil.* that the plaintiff would, and offered to accept the lesser sums, and the defendant would not pay them, but kept the judgments on foot by fraud and covin; and so upon the issue of fraud and covin, the plaintiff might give in evidence of such matter that should serve him to avoid the penalties; but he cannot aid himself by such general manner of pleading, as it is in this case at bar; for which judgment was given for the defendant *per tout le Court*, *scil.* Treby, Nevil, Powel, and Rookeby. But then it was prayed by the plaintiff that he might replead, which was granted to him by the Court, upon condition that the defendant might also replead in bar, and plead more judgments, if he had any to plead, but not otherwise. Lev. 3, 368, *Thompson v. Hunt*, Trin. 5 W. & M. in B. R.—(C.)

have relief and satisfaction out of these since accrued assets (*a*). If any ask how assets may after come, I will give him two or three instances. First, it may be by recovery of debts before withholden, or of damages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the testator, having a lease for twenty years, did demise the same to *J. S.* for the whole term, if he so long should live; if he were alive in time of the former verdict, but now is dead, the term continuing; this is now assets, which before was not, whilst it was but a possibility of a term. Other instances might be given, but these may suffice. If the executor pleaded that the testator stood bound in such a statute, or that there was such a judgment against him of debt to the King, beyond the satisfaction whereof the goods would not reach (*b*); this is in effect a *fully administered*, though special, and not general; and the law is alike (as I take it) in all these cases, as to the not making of the executor's goods liable. But in all these cases, though the debt shall not be adjudged upon the executor's own goods, yet

Lib. Intr. 148, 149. This good, though the judgment were by non sum inform. and an averment that it was without covin. Co. Lib. Int. 152, on demurrer. 11 H. 4, 6. There a cap. ad sat. was awarded for the damages.

(*a*) But if an executor or administrator plead payment, or recovery of other debts, in bar to an action, if it be by covin, it shall be no bar to a just debt. 8 Rep. 133, *Turner's Case*.—(C.)

(*b*) Where an executor or administrator ought in pleading to confess the debt, but that they have not assets, except to satisfy debts of record. 9 Rep. 109, *Merial Tresham's Case*.—(C.)

But he may, I think, forbear so to do, and to the judgment for part that when more assets come he shall have more. Lib. Intr. f. 323. In Tresham's Case defendant pleaded several statutes and recog. Plaintiff replies satisfaction, and being made for performance of covenants performed, judgment on demurrer for plaintiff is to recover debt & damages de bonis quæ fuer, &c. Si tantum ind in manibus suis habent, &c. Et si non habeat tunc dampna præd. de bon. et cat. ipsius def. propr. levand. Co.Lib.Int.152. Brokesby and Tresham.

the damages shall, in default of the testator's goods to satisfy them. And in these cases it is not material whether the judgment passed upon trial or demurrer. Nay, if the defendant executor plead no plea, but confess the action generally, or be condemned by *non sum informatus*; the judgment is the same, *viz.* to recover the debt only out of the testator's goods, and the damages of the executor's goods in default of the testator's. What if the executor defendant confess that he have assets to the value of part of the debt, not of the whole? There for so much as is confessed the plaintiff may pray, and have judgment presently without damages, and may maintain for the residue of the debt, that the defendant also hath assets for the rest, and so go to trial; as appears both by the printed book of entries, and other manuscripts which I have. But what if this trial pass for the plaintiff? Shall he then have an additional judgment for damages in respect of the former? I think he shall have costs, which commonly run with or in the name of damages; but without a writ to inquire of damages, none being found by verdicts, the Court doth not usually adjudge damages. Yet in the Book of Entries I find 6 s. 8 d. damages assessed by the Court upon a confession in a writ of *rationab. part. bonor.* against executors, and this hath much affinity with an action of debt. Yea, in the very action of debt where the jurors for miscarriage after their departure from the bar were fined, I find that the plaintiff renouncing the assessment of damages

by them made, and praying the Court to assess the same, it was done accordingly: but this was a special case.

M. 28 H. 6.
Ro. a. 321. Lib.
Intrat, 329, a.

Whereas we before showed that an executor denying his executorship shall, if it be found against him, pay the debt of his own goods for his false plea; this thereabout occurreth to be added, *viz.* that *that* is only where the immediate executorship of the defendant is denied. For if *B.* be made executor by *A.*, and *B.* dying makes *C.* his executor; now if *C.* be sued for the debt of *A.* as executor of *B.* executor of *A.* and he denieth that *B.* was executor of *A.* which by consequence is a denial of his being now executor of *B.* yet if this fall out in trial against him, he shall not in his own goods stand liable to this debt, because it is possible that he might not know to whom his testator was executor. So if *A.* made *B.* *C.* and *D.* his executors, and *E.* is sued as executor of *D.* the surviving executor of *A.* if *E.* deny that *D.* his testator survived *B.* and *C.* by consequence whereof he denieth the truth, *viz.* that the executorship of *A.* is devolved to him, yet shall not this, found against him, charge his own goods; for he might be ignorant of this point in fact, *viz.* whether *B.* *C.* or *D.* lived the longest. And here he denied not his own immediate executorship, but a mediate or more remote executorship. And so, I think is the law, where *C.* being sued as executor of *B.* executor of *A.* he pleads that *A.* by a later testament made himself executor, which is found against him; so as here he falsely pleaded, and

See Lib. Intr.
322.

pretended himself to be the immediate executor of *A.* and so denied the mediate executorship, viz. of *B.* to *A.* and of him to *B.* Yet *quære* of this; for why should not as well his false making himself an executor immediate to the indebted testator charge his own goods, as well as his false denying of that executorship; since both pleas tend to the overthrow of the plaintiff's action, and each equally rested in the defendant's knowledge? But this difference is between them apparent, viz. that the denial of executorship, if true, is an utter and perpetual bar to the plaintiff, as against him so pleading; but the affirming of an immediate executorship, where he was sued as executor mediate, doth not so, if true, but directs the plaintiff to a better writ of action, viz. against him as immediate executor to the indebted testator.

Whereas we have before touched upon the coming of assets futurely to executors, I think it is not amiss to consider a little the form and frame usual in pleas of fully administered, which thus run, viz. *Quod die impetr. &c. plene administravit omnia bona et catalla quæ fuerunt præd. S. temp. mortis suæ, et nihil hab. de bonis, &c. quæ fuer præd. S. temp. mortis, &c.*

7 H. 4, 39.

Bro. 50. This plea is not good, per Cur. because some may have since accrued.

Thus tying his denial upon the things which were the testator's at the time of his death, what if then the executor have, at the time of this plea pleaded, goods which were not the testator's at his death, but since accrued, as before is showed; or perhaps a lease for years sold by the testator, upon condition to be void, if five hundred pounds

said at such a day, which happening after testator's death, and default made, the term meth; or, if the executor by a writ of error be a judgment given against his testator for hundred pounds, and so is restored thereunto; the plaintiff now reply generally, that he hath which were the testator's at the time of his ? How can the jury so find, when the truth is so? Surely this case is not common, nor show a precedent of a special plea therein. In reason methinks it should be specially, and generally, pleaded and set forth in the reply (a). And in case where one sued as executor, denieth that he was ever executor or ministered as executor, I find sometimes the allegation general, that he did administer, without showing wherein or how; and sometimes special, showing what thing was administered,

Lib. Intrat. 322,
a. b. but a place
must be showed.
So 11 H. 6, 19.
20 Br. 62.

The defendant pleads, fully administered: the plaintiff replies, that he had assets: the jurors find assets to 172*l.* ent to recover the whole debt of 200*l.* and costs and value of the goods of the testator, if, &c.; and if not, damages of his own goods. 8 Rep. 134, *Mary Shipley's*

case, the plaintiff, upon this bar, might have prayed judgment presently, for thereby he confesseth the debt; but he may have execution till the defendant have goods of the value. *Ibid.* and see 1 Lev. 286; 2 Saund. 214; 1 Sid. 2 Keb. 606. 631. 666. 671; 1 Ventr. 94.

If executors plead nothing in their hands, or heirs *per descent*, if assets found, judgment shall be for the debt. But upon plea, nothing *per descent*, the plaintiff may demand judgment presently, and a *scire facias* when assets do. 8 Rep. 131—134, *Mary Shipley's Case*.—(C.)

and where (a). Here note, that the executor defendant denying (as he must) two things, viz. 1. that he ever was executor; 2. that he ever administered as executor: the plaintiff, in his replication, is tied to maintain but the one of them, as the truth of the case is: that is, if in truth the defendant were made executor, but never did administer, now it must be replied, that he was made executor at such a place, without speaking any thing of his administering; on the other side, if

(a) When a man dieth intestate, and a stranger taketh his goods, or selleth them, in this case it maketh him executor of his own wrong, although the pleading be, he never was executor, or never administered as executor.

But when an executor is made, and he proveth the will, or taketh upon him the charge of the will, and administereth, in this case, if a stranger taketh any of the goods, or claimeth them for his proper goods, and useth and disposeth of them as his own goods, that doth not, in construction of law, make him an executor of his own wrong; because there is an executor of right, whom he may charge, and these goods, which are taken out of his possession after he hath administered, are assets in his hands. But although there be an executor or administrator, yet if a stranger take the goods, and claiming to be executor pay debts and receive debts, or pay legacies, and intermeddle as executor; there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor in right. And when a stranger taketh the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong; for the rightful executor shall not be charged but with the goods which come to his hands after he hath taken upon him the charge of the will. *Coke's 5 Rep. 34, Read's Case.*—(C.)

he did administer, but was not made executor, then only the administering is to be replied. But if it shall be found that the defendant had administration to him committed, and so administered by virtue thereof, then is the verdict to pass for the defendant, for this is no administering as executor; and upon a general denial thereof, this may be given in evidence, as the Lord Dyer reports to have been resolved. But if the plaintiff do in his replication maintain both the points, shall this make his plea double? Methinks it should; yet I find it so replied, and no exception taken for the doubleness (a). Trin. 17 H. 8. Rot. 28.

Replication only to the administration. *do done, Co. Lib. Intr. 144, b. Read v. Carter.*

Mich. 15 & 14 El. Dy. 30.

Lib. Int. 312, b. Tr. 37 *Eliz.*

A sole woman being executor, maketh a deed of gift of the testator's goods in trust, but continueth possession of them, and marrieth *J. S.* who also hath possession of the goods, and in an action of debt by a creditor fully administered is pleaded; now upon evidence the verdict shall pass for the plaintiff; for this alienation, being fraudulent, was void to all creditors, and so as to the plaintiff the goods continued the testator's, and so assets in the defendant's hands, as was held in the King's Bench. If fully administered be pleaded where the defendant hath assets for part, but not sufficient for all, and so it is found; yet shall not judgment

(a) But it is said, in case of an executor, though the plea be multiplied, or double, yet good; for one may answer to every thing alleged by him. 21 & 22 Car. 2, *Jefferys v. Dod.*—(C.)

Yet Finch. 46 E. 3, f. 9, 10, held the contrary, viz. that judgment should be of the whole, but execution only for so much, and a *scire fa.* for the rest when more assets.

See Coke, l. 8, f. 134.

be given for the whole, but for part presently, with a further award, that when more shall come to the executor's hand, the plaintiff shall then have farther judgment for the rest: so as that false plea doth him no prejudice, but makes him in as good state (the charges of trial excepted) as if he had confessed himself to have part. And I think the plaintiff, upon that confession of part, may pray the like judgment, without maintaining that the defendant hath sufficient for the rest; for if that be not true, why should he be put to the charge of a trial by jury? Yea, Sir Edward Coke, at the bar, Tr. 16 Eliz. said, that where fully administered is pleaded, the plaintiff is not tied to maintain the contrary, but may presently pray and have judgment to recover it when assets shall futurely come to the defendant's hands: which was denied by some. But truly methinks the law should be as he said, as well as in the former case, where for the part which the defendant had not assets to pay, it was done, upon verdict so finding. But there, as I conceive, it was not a present judgment, but an award that he should have judgment futurely; so as after, when assets come to the defendant's hands, the plaintiff must have a *scire facias* against the defendant, to show cause, not why he should not have execution, but why he should not have judgment, as I take it: yea, where it is found for the defendant that he hath fully administered, yet was it held by all the justices, 33 H. 6. 23, 24, and by Prisot, 34 H. 6, 24, that when assets after come to his hands, the

plaintiff shall have a *scire facias* to have satisfaction out of them; but that Markham, Yelverton and Fortescue, were of contrary opinion, and so was the whole Court, 4 H. 6, f. 4. And it stands with great reason, that where, upon a verdict fully found against the plaintiff, judgment is given *quod nihil capiat per breve*, there he cannot have any writ to execute the judgment for him, but is put to a new action of debt: yet where it is found that the defendant hath assets for part of the debt, but not sufficient for the whole, there it is very congruous that the plaintiff have presently judgment for part, and after, when more cometh, then by *scire facias* against the defendant obtain judgment and execution for the rest: for where both verdict and judgment were for the plaintiff against the defendant, whose plea, that he had no goods, was false, and so found by the jury. And this difference was strongly avowed by Serjeant Henden, Mich. 33, 34 Eliz. and after approved by Fenner, Just. 36 Eliz. none contradicting it: yet a book was cited, that the plaintiff recovering so much as was found in the executor's hands, he should be amerced for the residue; which Popham, chief justice, denied to be law.

So 19 H. 6, f. 37.
8 E. 4, f. 25.
See judgment
so entr. 151, b.
So 7 Ed. 4, f. 7.

This 21 H. 6,
40, 41.

Ideo Cons. est, quod præd. les plaintiffs nihil capiant per breve suum præd. sed sint in m'a pro falso clamore suo inde, et præd. les def. eant inde sine die, &c. Co. lib. intr. 151, b. There was a verdict for the defendants executors of an executrix, *quod non habuer. bona, &c.*

CHAP. XVI.

WHERE JUDGMENT SHALL BE AGAINST THE EXECUTOR'S OWN GOODS, THOUGH NO PLEA OF THE DEFENDANT, NOR VASTATION DO SO OCCASION; AND OF THE SEVERAL MANNERS OF JUDGMENT IN SEVERAL CASES.

HOW by wasting, called by us commonly a *devastavit*, an executor may draw down the execution upon his own goods, bath formerly been handled and discoursed of; as also what kind of pleas do make the executor's own goods liable to the debt, and what not. Now let us see where, without mis-administering or mis-pleading, yet the nature of the action shall lay the whole debt or thing recovered upon the executor's own goods^(a).

(a) Assumpsit, and plaintiff declared that one J. S. devised a legacy to the plaintiff, and made the defendant executor; and the plaintiff intending to sue him for it, he, in consideration of forbearance, promised the plaintiff to pay him. The defendant pleaded several bonds and judgments, and that he had not assets *ultra*; whereupon the plaintiff demurred, and had judgment without argument; for the assets is not material, if he had any or none, being charged upon his own promise, in consideration of forbearance; and forbearance of suit for a legacy is sufficient consideration. 2 Lev. 3, *Davis v. Reyner*.

He who maketh a promise to another, that if he will forbear to sue one, if he do not pay, he who promiseth

And this we shall find in some few cases. 1. Where an executor is sued for rent accrued and behind

For rent behind since testator's death.

will pay the money, shall be generally charged upon his own promise. So when one is executor, and maketh such a promise, the debt is due by him in right of his executorship, and the promise is made in his own right, and therefore he shall be charged in an action brought upon his assumpsit generally; yet that money shall be allowed him in part of his account as executor. Co. 9 Rep. 94, *William Bane's Case*.

Assumpsit, that whereas Saunders was indebted to divers persons, and the plaintiff bound for him, and forced to pay them: the defendant, executor of Saunders, in consideration that the plaintiff would forbear to sue him for the money, promised to pay him. After verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment, that here is no consideration, for it doth not appear that Saunders had promised, or was obliged to save him harmless; and *Borden and Thin's Case*, Yelv. 40; and *Smith and John's Case*, Owen, 132, were cited. But *per Cur.* it was equity that Saunders should save the plaintiff harmless, and suit in equity is a suit; or perhaps he might be charged *per plegiis acquietandis*; and therefore they held the consideration good, and gave judgment for the plaintiff, *nisi causa, die Lunæ prox. &c.* Lev. 1 p. 71, *Scot v. Stephenson*.

Error of a judgment in assumpsit against the defendant, an executor, where the plaintiff declared, that whereas the testator was indebted to him, the defendant assumed that in consideration the plaintiff had at the request of the defendant accounted with him, upon which he was so much in arrear: the defendant then promised to pay it: the plaintiff there had judgment *de propriis bonis* of the executor, and assigned it for error; but resolved it to be no error; for the plaintiff was not bound to account with the executor, and he did it at the request of the executor. And by Hale, although that a bare account will not bind an executor to pay *de bonis propriis*, yet a promise upon consideration of forbearance

The suit is in
the *debet* and
detinet.

after his testator's death, upon a lease for years made to the testator, and by him left to his executor; here it shall be adjudged and levied upon his own goods; for that so much of the profits as the rent amounted to shall be accounted as his own goods, and not his testator's; therefore he is to be sued as well in the *debet* as in the *detinet*, where in other cases he is not, but in the *detinet* only, being sued as executor. So if any thing delivered to, or detained by his testator, come to his hands, and he still detains the same after the demand, and be thereupon sued in an action of detinue; for this is his own act (*a*). Nor in this case need he to be named as executor, for he shall not answer damages for his testator's detaining. So if he assume to pay out of his testator's assets, and be sued upon this *assumpsit*, and which debt is to be recovered in damages, and that out of

would; and the case here is all one; for it ought to be intended that an express request was made to account, and upon that an express promise to pay, otherwise the evidence would not maintain the declaration, upon which the judgment was affirmed *per tout le Court*. Lev. 2 p. 122, *Hawes v. Smith*.—(C.)

(*a*) If I deliver goods to one who is indebted to me, and he dies, against his executors I may have a writ for the goods, and for the debt; because that the writ is against the executor for the debt in the *detinet*, and for the detinue it is in the *detinet*; and therefore the writ well warrants the count to declare partly for debt and partly for detinue; but, such action he could not have had against the testator, because against him in debt the writ ought to have been in the *debet et detinet*. Touch. of Prec. 40.—(C.)

the executor's own goods; yet 'is this action, and the assumption which is the ground thereof, founded in the executorship, and his having assets¹; for if either he had not been executor, or if he had not assets at the time of the promise, it had been *nudum pactum*, and would not have bound him, nor given good cause of suit (a). Nay, to go farther, in the case of assumption by the testator, and suit against the executor thereupon, we find the judgment in Mr. Plowden's Commentary taken against the executor generally, as if he had not been an executor, not fixing it upon the testator's goods; yet there the very debt itself is

5 Mariz. f. 112.
Read and Nor-
wood's Case.
Co. lib. Int.
f. 1, 2.

(a) If an executor promise to pay a debt of the testator's, and have no assets in his hands at time of the promise, and there be no debt, he may give the same in evidence, and probably have thereby remedy against his promise. Coke's Rep. 94, *William Bane's Case*.

And now no action against an executor, to charge him on special promise, to answer damages out of his own estate, unless a note thereof be in writing, signed by the party, or authorized by him. 29 Car. 2, s. 4(1).—(C.)

1) The statute which makes him liable to an action on a special promise does not dispense with the necessity of his having also received assets. *Rann v. Hughes*, 7 T. R. 350, n.; see 5 T. R. 6. Nor can he be charged personally on an account stated, or for monies lent, or had and received as executor. *Rose and ux. v. Bowler*, 1 H. B. 108. But if there be any consideration, as of forbearance, it is sufficient to charge him personally; or if he take the debt upon himself, by giving a security. *Childs v. Monins*, 2 Brod. & Bing. 10; 1 T. R. 691; 7 T. R. 453.—(E.)

included in the damages. But contrarily was it after in the seventh year of the late King, viz. judgment given, that as well the damages as the costs should be levied of the testator's goods, if so much in value of them were in the defendant's hands; and if not, then were costs only of the goods of the executor. And this surely is the righter and more just way; for there is no reason that upon a promise, more than upon a bond, the law should cast the whole debt upon the back and estate of the executor. But perhaps the two judgments may be reconciled thus: the later was given upon a verdict, *non assumpsit* being the issue, and there the jury assessed damages in certain, viz. 523*l.* with the costs; so as here the judgment was complete and full, viz. to recover the said sum: but in the other case the judgment was had upon a demurrer, so that the damages not being known, it was generally, that the plaintiff should recover his damages against the defendant, *sed quia nescitur quæ damna*, &c.; because it appeareth not to the court what the damages were: therefore a writ was awarded to inquire of damages, upon the return whereof executed, the judgment was fully and completely to be given of a sum in certain; which second judgment it appears not by the book in what manner it was entered, and therefore might perhaps be then agreeable with the other. And that the said first judgment, before damages inquired of, is not a plenary and full judgment, but an award of judgment hath been divers times resolved; and that

Tr. 30 Eliz.
Pasc. 33 E. in
Com. Ban.

therefore any defect and insufficiency in the declaration may be showed time enough after the first, and before the second judgment. Yea, if the plaintiff die before the second judgment, though after the first (a), the action falleth to the ground: so if the defendant die: otherwise of death after full judgment. But this notwithstanding, and howsoever there were done upon the second judgment, methinks it were righter and fitter that the damages should be had and levied out of the testator's goods, for whom and in whose right the executor is sued.

Another case there is, wherein the judgment must be, as it seems, against the executor's own goods, viz. in an action of covenant for a breach of covenant since the testator's death (b): for so

For breach of covenant since the testator's death.

(a) But see 8 & 9 W. 3, c. 10, in what cases actions shall not abate.

(b) Covenant against an executor, upon the covenant of the testator, to teach an apprentice his trade; and after verdict for the plaintiff, it was moved in an arrest of the judgment, that this covenant was personal to the testator, and did not oblige the executors, but only obliged the master, during his life, to teach the apprentice: but *per Cur.* it obliged the executors also, and they ought to see the apprentice taught his trade; and if they be not of the trade, they ought to assign him to another that is of the trade, so that he may be taught according to the covenant. And judgment was given for the plaintiff. Lev. 1 p. 177, *Walker v. Hull* (1).—(C.)

(1) The case of *Walker v. Hull*, 1 Lev. 177, is denied to be law in the case of *Baxter v. Burfield*. 2 Stra. 1266, 1267. —(H.)

Lib. int 329, a.
& b. de terris et
catallis, &c.

was it held both by all the judges of the Common Pleas, except the Lord Dyer, and by the prothonotaries, in the late Queen's time; where the case was of a house upon the lease negligently burned in the executor's time, for which damages only were to be recovered. And sometimes where the executor himself is to bear the burthen, I find the judgment entered, that the sum recovered shall be levied of the lands and goods of the executor (a).

(a) There is a rule, that if debt be recovered against executors who have nothing more than the debt recovered, and before executors they are impleaded by another, and suffer recovery and execution thereupon, they shall be charged of their own proper goods to the first plaintiff; for that they might have pleaded the first recovery; for the judgment in that case is, *quod quer. recuperet debitum de bonis testatoris*, &c. So the goods are charged thereby, &c. Dyer, 80, pl. 53.

Error of a judgment in debt, upon a judgment in the Common Pleas, where the plaintiff declared in the *debet* and *detinet* against an executor, and declared of a *devastavit*, and had judgment *de bonis propriis*, and the judgment affirmed in *Banco Regis*; and in other like cases hath been the like judgment. But between *Ent.* and *Withers*, Mich. 29 Car. 1, B. R. in debt upon an obligation, and count of *devastavit* against an executor in the *debet* and *detinet*, it was ruled by judgment for the defendant; for the Court would not allow the action over which had been before; *scil.* in debt upon judgment; and so held the Court before, in the time of Hale, in the case of one *Horsey* and *Daniel*. Lev. 1 p. 147. *Cory v. Thinne*.

Scire facias against executors, with *feri facias* for to levy the debt and damages of the goods of the testator, *si tant*, &c.; *et si non, tunc* damages of his own proper goods: the

Judgment pleaded for 5,000 l. on a note payable with interest, which interest amounted to 1,700 l.

Sheriff returned, that the executor had not goods to satisfy the debt, but that he had levied the damages of the goods of the testator; upon which issued another *feri facias*, awarding that the defendant had wasted the goods of the testator; upon which the sheriff returned, that he had wasted the goods; and this was traversed and tried, and a verdict for the plaintiff: and upon motion in arrest of judgment, it was staid *per tot. Cur.*; for the return upon the writ was ill, for the goods of the testator ought to be charged with the debt, and not with the damages, if they were not sufficient to satisfy both, but the damages are to be levied of the goods of the executor, for the delay; and although that the trial and verdict be upon the return of the second writ, and the first limited good and accepted by the plaintiff, and it is for the advantage of the defendant to have his costs levied of the goods of the testator; yet all the proceeding on the second writ being founded upon the return of the first, which is ill, it is ill; and by the whole Court the judgment was stayed. *rev. 1 p. 7, Herne v. ———.*

Debt against an executor, who pleaded a judgment, and that he had not any goods except what are not sufficient to satisfy the judgment; upon which the plaintiff demurred, specially because he did not show what value the goods are which he hath; and now Jones argued that it is ill in substance; for that upon general demurrer, as *Tresham's Case* (Co. 9); and if it be no other than form, as *Moore and Andrew's Case* is (Hob. 133); yet being specially demurred to, is ill. *Cur.*: it is no other than form. Co. Ent. 146. 48, 149. 152. 269. 617, B. But being specially demurred to, is ill. Lev. 1 p. 132, *Davies v. Davies*. All the pleas in Coke's Entries here cited are *non habet*, &c.; *bona et catalla*, &c.; *præterquam bona et catalla, quæ non attingunt ad satisfactionem præd. 3,000 l.* or to that effect, not mentioning any sum in their hands.—(C.)

was adjudged a *devastavit*; for the administrator should not have suffered so much interest to be in arrear. 1 Lev. 30.

CHAP. XVII.

OF WOMEN-COVERT EXECUTORS.

THERE being two kind of persons who have some disability upon them, *viz.* feme-coverts or married women, and infants, touching whom we find in many places question and debate in our books, we will consider of them by themselves, or apart from others; yet not joining them together neither, but each by himself separately.

First, therefore, of feme-coverts, touching whom we will consider these three things:

First, whether they may make wills and executors with or without their husbands assent; and how, whereof, and in what cases (1).

(1) Where there has been a stipulation, by marriage settlement or otherwise, that the wife shall have the power of disposing or alienating either personal or real property, the testamentary power is included, and it extends to all accumulations arising therefrom. 4 Bac. Abr. 244; Str. 891; Br. Ch. R. 8; 1 Ves. jun. 46; 2 Vern. 535; Pr. Ch. 44. 355. So when property is given in trust for the sole and separate use of a feme-covert, the power of testamentary disposition is incident thereto. 3 Br. Ch. 8; 1 Ves. jun. 46. Every

Secondly, whether they may be made executors about their husband's assent, or how their husbands may hinder it.

1 appointment must, however, be proved as a testamentary . 1 Burr. 431 ; Doug. 707 ; 2 P. Wms. 674 ; 2 Ves. 75. . And it seems that she shall have it independently, ther trustees were appointed or not, although this was nerly made a distinction. 1 Fonbl. 87. 98 ; 1 P. Wms. ; 2 *Id.* 79. 316 ; 1 Vern. 261 ; 2 *Id.* 659 ; 2 Ves. 452 ; tk. 399. But in general, in equity, a settlement made ore marriage, in consideration of the wife's portion, vests her interests in the husband (3 Bac. Abr. 65 ; Doct. & A. 1, c. 7) ; and he has an immediate interest in legacies Roll. Rep. 134 ; Com. Dig. Bar. & Fem. E. 3), though actually reduced into possession during her lifetime, and ; whether there was any agreement to that effect or not. . Wms. 100, n. D ; 2 Vern. 502 ; Pre. Ch. 63. 412 ; Ca. ip. Talb. 168. But it seems such settlement should be extensive with the wife's portion, or it will only vest her tels in him *pro tanto*. If her fortune be in the Court of ncery, to enforce a settlement or otherwise, and she die, shall have it absolutely ; or if he die, his representatives ; it, subject to the same equity as he himself would have n, and there being issue or not of such marriage, makes difference. Pre. Ch. 418 ; Ambl. 503 ; 1 Fonbl. 89. ity considers mortgage-money only as a chose in action, there is no distinction whether it be in fee or for a term ; he fee of the mortgaged lands is in the wife, she is but a trustee thereof, for the benefit of those entitled to the K. Harg. Co. Litt. 351, n. 1 ; 2 Atk. 207 ; 1 P. Wms. 458. o gifts, which in their nature can only be the separate of the wife, as jewels. 1 Fonbl. 98 ; 3 Atk. 393. o private gifts of the husband, to the separate use of the (3 P. Wms. 247) ; but not against the claims of creditors. tk. 72. But if she deposit savings in the hands of ngers, or receive a note of hand from one, it shall be n as part of her husband's estate. Bunb. 188 ; 2 Atk. ; 1 Ves. 289. Where the wife has a separate interest

Thirdly, what acts in execution of the executorship they may do without their husbands, or their husbands without them.

during coverture, if she suffer her husband to receive and dispose thereof, his representatives shall not be accountable to her for more than one year, unless he received it under any agreement to that effect. 2 P. Wms. 82. 340; 3 *Id.* 356; 2 Ves. 190. But she will be entitled to all arrears, if she be living apart from him. 3 Atk. 695; 1 Ves. 298. She will be entitled also to a legacy from him, for the gift only takes effect by his death, when her capacity revives. Co. Litt. 172.

The wife is also entitled, over and above her jointure or dower, to certain chattels, such as her bed, necessary apparel, and personal ornaments, consistent with the rank and station of her husband. These are called *bona paraphernalia*. 1 Roll. Abr. 911; 11 Vin. Abr. 179; Swinb. p. 6, s. 7; Civ. Car. 343; 2 Leon. 166; Jon. 332; Moore, 213. The extent of this claim is always in the discretion of the Court, and is only admitted in case of their being sufficient assets for the payment of debts (2 P. Wms. 738; 2 *Id.* 544; 3 Br. P. C. 187; 2 Atk. 104; 3 *Id.* 369; Moore, 216), and at the time of his death. In London, by the custom, she can only retain some, and not the whole of such goods. 11 Vin. Abr. 180; Nels. Ch. R. 179. They shall, however, be preferred to legacies (2 P. Wms. 80, n. 1; 3 Atk. 369; 2 Ves. 7); and over against creditors she may retain her necessary wearing apparel. 2 Roll. Abr. 911. This right extends only to such as are in her possession at the time of his death; for if he will, he may dispose of any such in his lifetime. If he only pledge them, and there is a sufficiency of assets, she shall be entitled to have them redeemed. 3 Atk. 395. But it seems he cannot alienate them from her by will (3 Atk. 394); and if he give them to her by will for life, and afterwards over, she may elect to take them absolutely as paraphernalia; but if she do not so elect, her executor cannot demand them (2 Vern. 246); and she may exclude her right altogether by her marriage articles. 3 Bac. Abr. 66; 2 Vern. 49. 83.—(E.)

A woman married, or feme-covert, we know is *h. potestate viri, cui in vita contradicere non* Sect. 1.
 test, as saith the writ given by the law to the
 fe for recovery of her land after her husband's
 ath, being alienated by him. Therefore it is
 at judges, when a woman is to acknowledge a
 fine of any land, do examine her apart from her
 isband, to know whether she be willing, or
 me to do it by the compulsion of her husband :
 is therefore hard for her to have freedom of
 ll, and consequently freedom to make a will.
 esides, all her moveables, or goods personal,
 hich she had at the time of her marriage, other-
 ise than as executrix or administratrix, are by
 e law totally devested out of her, and settled in
 e husband as fully *ipso facto* upon the very
 arriage, as any other that were his own be-
 re (a). Of these therefore she can make no

Sola et secretè
 examinata.

Debts except,
 which are not
 properly goods.

(a) The Spiritual Courts have the probate of wills ; but a
 me-covert cannot make a will : if she disposeth of any
 ing by her husband's consent, the property of what she
 disposeth passeth from him to her legatee, and it is the
 ft of the husband. If the goods were given into another's
 unds in trust for the wife, still her will is but a declaration
 the trust, and not a will properly so called. But of things
 action, and things that a feme-covert hath as executrix,
 e may make a will by her husband's consent ; and such a
 ill being properly a will in law, ought to be proved in the
 spirital court. Mod. Rep. 212, Anon.

A married woman cannot make her testament of any
 anors, lands, tenements, or hereditaments, by the statute
 f 34 H. 8 ; neither can she make a testament of goods or
 attels without her husband's licence, except she be a queen
 t empress, or that she were executrix for some other

disposition, no more than of other her husband's goods. But in case she do by will bequeath

person: for in such case she make her will of such goods as she hath as executrix, without his license; and name her executor, who shall have them to the use of the first testator; but she cannot give them away as a legacy; and if she die without will, yet in such case such goods as she had as executrix (of which the property is not altered) shall not go to the husband, but administration thereof shall be committed to the next of kin to the first testator. But in both these cases the husband shall have the profits arising out of the same; as calves, lambs, and such like profit of kine and sheep. Also, if the wife have goods by way of legacy from another person, in such case she cannot make a testament, or dispose of the same without his license. Note, though the husband do give license to a wife to give away part of his goods, yet notwithstanding he may countermand her testament again, either before or after her death, or at least before the probate thereof. But if the wife make her testament of his goods, and the executors prove the same, and the husband delivers the goods to the executors, then he cannot countermand the testament, though the wife made it without his license or knowledge; for by this after-act the law presumes he gave consent at the first. 34 & 35 H. 8, c. 5; Bract. l. 2, c. 26.

A wife, whose husband is banished for life by Act of Parliament, may make a will, and in every thing act as a feme-sole; and the legatees under the Lady Sandys, whose husband was so banished (in the case 2 Vern. 104), were decreed their legacies. *Countess of Portland and Procter*, c. 2 Vern. 104; Cro. Eliz. 27; Cro. Car. 219. 376. 597; Mich. 8 Jac. *Graunt's Case*, Roll. Abr. 608; 1 Mod. 211; 212; 2 Mod. 172, 173; 34 & 35 H. 8, c. 5. Wills or testaments of manors, lands, &c. made by feme-coverts, infants, idiots, or persons of non-sane memory, shall not be good in law.

The wife may not be suffered, though to good uses, to

hem, although the will and the gift be void (a), yet if the husband, as the case was in the time of Edward the Second, do after his wife's death consent to this her will and gift, by delivering of the goods bequeathed, after her death, or assenting that the legatee take them by virtue of such will and gift; this amounteth to a new gift by the husband. If a woman have a lease, an estate by extent, a wardship, the next avoidance of a church, or other chattel real, these are not divested out of her into her husband by marriage (1), but in case

5 E. 2. Fitt.
Devise 24.

dispose of any money she hath raised out of her husband's estate by frugality. But otherwise it is of monies raised out of a separate maintenance. Ca. in Ch. 117, 118, *Pridgeon v. Executor of her Husband*.—(C.)

(a) If feme-sole make a will, and after take husband, the making of husband and coverture at the time of death is a countermand of the will; the making of the will being only the inception of it: for *omne testamentum morte consummatum est; et voluntas est ambulatoria usq. extremum vite exitum*. 1 Rep. 61, *Forse and Hembling's Case*.—(C.)

(1) But if he sue, in order to recover possession of such chattels, it seems sufficient to divest the wife's interest (1 Roll. Rep. 359), or if he submit his right to arbitration. Dyer, 183. So, if he make a lease, though it be to commence after his death. Gro. Eliz. 387; Poph. 5. But if such right be not by his act wholly divested, it shall survive, and be remitted to her, free from any incumbrances he may have charged thereon (Plowd. 516; Co. Litt. 351; 1 Roll. Abr. 344); and it seems that if any judgment, recognizance, extent, or other charge be incomplete at the time of his death, it shall not afterwards be made complete so as to defeat her rights. 1 Roll. Abr. 344-346; 2 *Id.* 157; Co. Litt. 46, b. So where a rent

she overlive him, they continue to her as before (a); no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his life-time (1), though not by his will: yet such a woman, in her husband's life-time, could not, of or for these things, without her husband's assent, make an executor or will; but she dying before him, they would, by the operation of law, accrue to him (2). And here

(a) A wife, executrix of the first husband, shall have the goods of the first husband, and not the executors of the second husband, if he made no gift of them in his lifetime—(C.)

rent is limited to them jointly, and becomes payable after his death, she shall have the arrears. 1 Roll. Abr. 350; Moore, 887. So if he die during the avoidance, but before presentation to an advowson which he had in her right, she shall have it. Co. Litt. 351; Com. Dig. Bar. & Fem. E. 3. But if he survive her, he shall have an avoidance which occurred during the coverture. So if she be tenant in dower and lease, he shall have arrears of rent accruing during coverture (Moore, 7); and so if she be tenant in tail, or for life. 32 H. 8, c. 37. So of a trust-term to her separate use. 1 Fonbl. 98; 1 Vern. 7. 18; 2 *Id.* 270; 2 Atk. 421, *sed. vid.* 2 Bro. Ch. C. 345; and Com. Dig. Ch. 2, M. 9.

(1) Plowd. 418. Or they may be taken in execution for his debts. *Id.* 268; Co. Litt. 46, b. But *quære* as to merely contingent interests (10 Co. 51; Com. Dig. tit. Baron & F. E. 2); though it seems they now follow the rule of other property. Co. Litt. 351; Harg. n. 1.—(E.)

(2) So if they mortgage a term of the wife's, he shall have the equity of redemption. Hob. 3. And wherever he hath sown the land, whether interested only in right of his wife, or as joint-tenant, and he die before severance, his executor

hen observe a case, though not frequent, yet full of mischief when it happens : suppose that a woman indebted a thousand pounds, and having leases and moveable goods to the value of three thousand or four thousand pounds, marrieth with J. S. and then dieth before the debt recovered against her ; in this case the husband shall have and go away with all this value of his wife, and is not in law liable to pay one penny of her debts, because he is neither her executor nor administrator. What the Chancery could do, or rather what the lord chancellor or lord keeper would do, in this case, I will not take upon me to say or determine. Another sort or kind of goods, or rather interests, a woman may have, *viz.* debts or things in action, which as the former, are not devested out of her by marriage into her husband, nor yet can she thereof make an executor without her husband's assent, although they be one degree farther from the husband than the said chattels real ; for that though the husband do overlive the wife, he shall not be entitled to them as to the former (1). But if his wife make him ex-

During her life he is, but not after ; and if he was her executor or administrator, such goods could not be assets.

But the husband may receive them, or release them. 12 H. 7, f. 22.

shall have the profits. Co. Litt. 55, b ; Harg. n. 5. 7 ; Gilb. Er. 245, 246 ; 1 Roll. Abr. 727 ; Vin. Abr. Emblements, pl. 16 ; Com. Dig. Biens. G. 2 ; Harg. Co. Litt. 351, n. 1.—(E.)

(1) But bringing an action in his own name to recover them is a sufficient indication of his intention to prevent their surviving to his wife, though if he die before execution, it has been said the wife shall be still entitled. 3 Atk. 21. So if he join in the suit. Co. Litt. 351 ; Harg. n. 1 ; 2 Veq. 676 ;

The husband was sued in spiritual court as executor to his wife.

So she is often to former husband, and to father, &c.

Godolph. 1.
11 Vin. Abr. 141.

ecutor, as she may, or if after her death he take administration of her goods; then, as he is thereby entitled to them, so is he liable also to pay her debts out of the same, when he shall have received them.

Lastly, *dato*, that a woman-covert is executrix to some other person, and in that right hath goods moveable; these are not devested out of her, because she hath them not merely to her own use, but as representing the person of another (*a*): but whether then may she without her husband's license or assent, in respect of her being an executor, and for continuation of this executorship, make executors, and consequently a will, or not? Hereabout hath been much diversity of opinion. Some books generally speak, that the wife may make an executor, but speak nothing of the husband's assent, whether necessary or not.

(*a*) But the release of feme-covert executrix is not good, for she can do nothing to the prejudices of the husband. But without question the release of the husband is good. 5 Rep. 27, Cases of Executors.—(C.)

1 Vern. 396. So it seems that his appointment of an attorney to receive such debt or chose in action, is a sufficient reducing into possession to vest it in his executor. Roll. Abr. 342; Moore, 452. Without which he cannot indeed possess himself of any interest which he had not previously reduced into actual or constructive possession. Com. Dig. Bar. & Fem. E. 3; Co. Litt. 351, b.; Harg. n. 1; 2 Vent. 341; 2 Vern. 707; Ca. Ch. 182. So if there be a joint decree in equity, the benefit survives to her. 1 Ch. Ca. 27; 10 Vin. jun. 579.—(E.)

Elsewhere we find it mentioned, that if the husband, after the wife's death, countermand (some books, false printed, say command) the proving of his wife's will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this wife stood, viz. whether she were executor or not; no, not so much as whether she had any thing in action, or chattel real or not, so as nothing in particular can be grounded upon that case. But there are express opinions that the husband's assent is absolutely necessary even in this case (1), so as without it the wife's making an executor shall be merely void; and, consequently, he to whom she was executor shall now by her death be dead intestate. And of this opinion was Babington, chief justice, in the beginning of Henry the Sixth, his time. Yet contrary hereunto was the opinion of Fineux, chief justice, in the time of King Henry the Seventh, viz. that where the wife is an executor, she may also make a will and an executor

39 H. 6, f. 27.
34 H. 8, f. 8.
Bro. Testaments, 21.

18 E. 4, f. 11.
Vavasor, just.

4 H. 6, f. 31.

12 H. 7, 24, b.

(1) He has such an absolute interest in the effects of the deceased, that he may act in the administration either with or without her assent, and it shall be binding on her. Com. Dig. Adm. D. 1; Ld. Raym. 369; Bl. Rep. 801; 4 Term Rep. 617; Salk. 117. 306. But she cannot administer without his assent: if he die, her right survives, as every thing which remains unadministered by him; but if she die, he has then no further power, for it was merely in her right that he interfered during her lifetime (Com. Dig. Bar. & Fem. F. 1); and it seems, that if she make a will respecting her right in a representative character, the will shall stand good. 3 Bac. Abr. 10.—(E.)

Tit. Devis. f. 27.
Hil. 29 El. in
Com. Ben.

Co. lib. 4. 51, b.

without any consent or assent of her husband. And to this opinion doth Master Perkins, after consideration of the books on both sides, incline. But some will say, that since all this, in the late Queen's time this hath been contrarily resolved, viz. in the case between *Andrew Ognell*, plaintiff, and *Underhill* and *Appleby*, defendants; in the end of which case it is in express terms said to have been then resolved, that a feme-covert, or married woman, could not make an executor without the consent of her husband. To this I answer, that this case is to be construed with relation *ad materiam subjectam*, viz. to the matter and point in question and under consideration, which was that state of a woman whereof we have before spoken, viz. one having things in action, debts or duties to her belonging, as there in particular it was arrearages of rent due to the woman before marriage. As for the point of a woman executor to another person, it was never in that case under disceptation (a), nor once mentioned in the debate or arguments thereupon. Now considering the very form and phrase of judgments at the common law, which are thus, viz. *Ideo consideratum est per Curiam*, &c. not *adjudicatum est*; that is, it is considered by the Court not in express terms, that it is adjudged: this, I say, well observed (as to me it seems very remarkable), gives us to know

(a) "Disceptation:" this word is obsolete; it is *disceptatio* in Latin, and signifies a disputing, debating, or reasoning. Ainsw. Dict.—(C.)

that no more is adjudged than is considered of, the judgment being contained and clasped up in the words *consideratum est*. Wherefore, since in *Ognell's Case* the point of a woman-covert's ability, in case where she is an executor, to make a will and executor, hath not been considered of (the eyes, tongues, nor thoughts of the judges being once set upon it), it cannot be that that point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seems, the reason of that resolution, it appears not to have been the intent of the judges that the same should reach or extend to this case of a woman-covert executor; for it is added (as the reason of the judgment, in my conceiving), that the administration of the wife's goods doth of right belong to the husband; which amounts to this, in my understanding, viz. that where the wife's making of a will, and consequently of an executor, may be prejudicial to her husband, and prevent him of some benefit or advantage, or tend to his loss and disadvantage, there it shall not be available or effectual without his assent; and therefore not in the case of her, who, having debts or duties to her due, would, by making another to be her executor, exclude or preclude her husband from that benefit which to him should pertain as administrator of her goods. Now as for the goods, debts, or credits to her as executor to some other pertaining, no benefit could redound to the husband by having such administration of his wife's goods, for those should go and be to

the next of kin of the wife's testator, taking administration *de bonis*, not *administratis*, of him, if she have no executor; and therefore her making executor, as touching these, brings no hurt or prejudice to her husband, and so is out of the reason of *Ognell's Case*. Since then it is so, and since the law favoureth wills, and it was by implication part of his will who made her executor, that she should have power to continue his executorship, by making another to succeed therein after her decease, for performance of his will, why should the law give to the husband, who can receive no prejudice thereby, power to give impediment thereunto? For *frustra est inutilis potentia*: even reason itself stands and awards against him in this case a *quare impedit*, or rather a *non impedit*, as to me it seems. Wherefore, to conclude, I take it that the opinion of Fineux is good law in that point of a feme-covert executor, though not in the other point, where she hath only debts or things in action to herself due; for therein the said resolution in *Ognell's Case*, grounded upon good reason, gives me satisfaction to differ from Fineux, who, making no difference between the cases, held the husband's assent needless in both. *Posito*, then, the wife of *J. &* having debts due to herself, and being also executrix to *J. D.* makes without her husband's assent *J. N.* her executor, and dieth: what shall we now say? Shall we say, that as touching the goods and credits or things in action to her as executrix of *J. D.* pertaining, this will stands

nd *J. N.* as her executor may prove it, to her husband's will? And that as to its to herself, in her own right pertaining, is void, and thereof her husband may ministration? Shall she die both testate estate, with a will, and without a will? : have both an executor and administrator? t, to several purposes, as well as where an : is made only for one particular thing or ce, the testator may elsewhere die in-

And so where the executorship is dis- s before is shown, and one to whom part itted will prove the will, but the other to ther part of the executorship is committed take it upon him; here must needs be a or part testate and part intestate.

or the second point, *viz.* wives or women- being made executors, and so having the ' executorship put upon them against their l's will, there has also been diversity of

b. In the time of King Edward the First, 13 Ed. 1. Fitz. Ex. 119.

justice, saith she may be executor without band, and the administration shall be de- to her only. And I think he meant that ght be without the consent of her husband, her he would or not; for so it is said in : of King Henry the Seventh to be the law 2 H. 7, 15, b.

l; and indeed in courts spiritual no dif- is made between women married and ed, for aught I can find. There a wife nd is sued, alone without her husband; meddleth not, nor is intermeddled withal,

2 H. 7, 15.

touching the things pertaining to his wife. But at the common law it is otherwise; and therefore Brian, chief justice, saith, a wife without the assent of her husband cannot be executrix, he meaning thereby that the husband may oppose and hinder it; for such a one may be named executor in and by a will, without the knowledge of her husband. Let us then see how after the death of the testator the husband can hinder her proving the will, or intermeddling to administer, since it may be a matter both of much trouble and danger to him to have the executorship fasten upon his wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the husband; and therefore we will also consider whether the husband may (though his wife would refuse) assume the executorship, and fasten it upon her. The testator therefore being dead, and fame or common bruit carrying it to the ordinary, that the wife of J. S. is made executrix; if she come not in *gratis* or voluntarily to prove the will, process or citation is to be sent out of the spiritual court against her, to enforce her coming in to take on her the executorship. She coming may clearly, as well as any other person (especially if her husband concur with her therein), refuse this office, trust, and charge, so as if there be no other executor named, the ordinary must commit the administration. If she should not come and appear, she should be excommunicated, as I take it, notwithstanding any allegation or intimation by her husband of

this unwillingness to have her take upon her the
 executorship. But suppose she doth come into
 court, and offers herself ready to take the execu-
 torship upon her; and on the other side her
 husband expresseth his dissent thereunto, pray-
 ing that she may not have the execution of the
 will to her committed; what will then be done?
 This, I confess, pertains to another learning, and
 not to that of our profession. But forasmuch as
 I find, that in the courts spiritual, a wife stands
 in the same plight and state as a woman sole, the
 husband not intermeddling withal in the affairs of
 the wife; therefore do I conceive, that in that
 court the husband's refusal will not be of force to
 hinder the committing of the executorship to the
 wife not refusing; at least if there come not a
 prohibition to stay such proceeding in the spiritual
 courts. But whether a prohibition be in such a
 case to be granted or not, as I find no resolution
 in my books, so will I not take upon me to re-
 solve. This stands clear in the rules of the law
 of England, that the wife is under the husband's
 power, and cannot contradict him in pleading
 and doing other acts, even touching her own
 freehold: nay, she cannot take lands nor goods
 by gift or conveyance without her husband's
 assent, as the law hath been, and, for aught I
 know, is taken. But if once the will be proved,
 and the execution thereof committed to the wife,
 though against her husband's mind and consent,
 I think it will stand firm; and the husband and
 wife being after sued, cannot say that she was

33 H. 6, 31, 43.
 39 Ed. 3, 1.
 27 H. 8, 24.

never executrix. And I doubt whether the wife administering without the husband's privity and assent, although the will be not proved, do not conclude her husband as well as herself from saying after, in any suit against them, that she neither was executor, nor did ever administer as executor. Yet perhaps this administration by the wife, against her husband's mind, will (as against him) be as a void act; else cannot I see how Brian's opinion before cited, *viz.* that the wife shall not be executor without or against her husband's mind, can be law. On the other side, if the husband of a woman named executor would have his wife to take upon her the execution of the will, and to prove the same, but she will not assent thereunto (wishing, perhaps, that gain and benefit rather to some of her kindred by way of administration, than to her own husband by her executorship, as sometimes wives accord not well with their husbands); in this case I think the court spiritual will not fasten the executorship upon the wife against her will. But *dato* that the husband, though the will be not proved, doth administer as in the wife's right, but against her mind and will, shall she be now hereby bound and concluded, so as after she cannot decline or avoid the executorship? And surely I think, that during her husband's life she stands concluded at the common law, so that there shall not be nor can be sued alone an executor, and then being sued with him, she must join in plea with him, *viz.* that she neither was executor, nor admi-

11 H. 6, 4. The plea is, that the feme did, or did not administer, without speaking of the husband.

33 H. 6, 31. The husband may administer, and prove the will for his wife.

nistered as executor; and then this act of her husband's given in evidence will, as I take it, cause that the verdict be found against her: not so after her husband's death; for then she may refuse, as the Lord Dyer saith, and citeth as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be where a woman so made executor taketh a husband after the testator's death, before either proving or refusing to prove the will, and where she is made executor during the coverture; as there in case of a descent of her land to the heir of a disseisor; for when there is upon her such a state of election, she, marrying before her resolution or determination, doth upon the matter deliver it into the husband's hands: not so where it first findeth and falleth upon her in the state of coverture. If the husband were indebted to the testator, this making of the wife executor is, as I take it, a release in law, as well as if she were the debtor: but if after the testator's death she do marry such a debtor, it is a devastation (a).

1 Eliz. Dyer,
166. 1. there is
cited.
3 H. Rot. 112.
Nota per bill.

(a) Debt upon an obligation against baron and feme executors, and counts upon a devastavit by them, and upon demurrer, judgment against the plaintiff. First, because the feme-covert cannot commit waste during the coverture, although that the waste of the husband shall charge her if she survive, according to *Beaumont and Long's Case*; and 1 Cro. *Mounson and Bourne's Case*; Mich. 14 Car. Cro. Car. *Mounson and ux. v. Bourne*, p. 518. 526. Secondly, the Court would not carry this action further than they have done, that

THE THIRD POINT.

Touching the Administration or Execution of the Office of an Executor by a Feme-Covert and her Husband.

WE will now come to admit the execution of the will assumed by concurrent consent of husband and wife, and the will proved with both their likings in the wife's name; and examine what acts the wife of herself is able to do, and what her husband without her.

It hath been conceived by many of old, and by some of late, that if a feme-covert or married

is to say, debt upon a judgment, but not debt upon an obligation; and between *East v. Withers* (3 Lev. 2 p. 209), it was adjudged, that debt doth not lie upon an obligation against an executor counting of a devastavit. Lev. 2 p. 145, *Horsey v. Daniel*.

And afterwards, in debt upon the judgment *quod recuperat debitum de bonis*, omitting *testatoris*, and damages *de bonis le baron propriis*, in declaring of a devastavit, it was resolved, that although the first judgment is ill, yet it is good to maintain this action till it be reversed; for the advantage of the error shall not be taken so long as it remains unreversed. But, secondly, it was adjudged that this action lieth not; for although that the wife, if she survive, shall be charged for the waste committed by her husband, yet she shall not be charged for the costs recovered against the husband *de bonis propriis*; for which, upon demurrer, judgment for the defendant. Lev. 2 p. 161, *Horsey v. Daniel*, —(C.)

woman executrix release a debt of her testator, or give away the goods which she hath as executor, or deliver a legacy bequeathed, it was firm and good; and on the other side, that her husband's gift or release was of no value, for that the administration or execution of the will is committed to the wife only. And some have gone so far as to say, that she may sue or be sued without her husband, in the courts of common law, I mean; for in the spiritual court it is true the husband is not joined with the wife in suit. But the law is doubtless in all those points contrary, as not only some opinion also was of old, viz. in the time of Henry the Seventh, but also hath been in the late Queen's time resolved; for otherwise, if the wife's gift or release should stand good, her act might exceedingly endamage her husband, and make his goods liable to the creditors, the testator's estate being wasted by the gifts or releases of his wife. Wherefore it was held, in the said late case, that unless due payment were made to such women-covert executors, their releases or acquittances be void, and so also their gifts and grants; yea, it was then held, that the husband of the wife-executrix may give goods, or make release of debt, at his pleasure. But doubtless by marriage neither are the goods (though personal) which the wife hath as executor devested out of her, and settled in her husband, as her own goods are; nor, if she die, shall they accrue to the husband, if no alteration were of the property, but shall go to her executor, or to the next of kin,

See 18 H. 6, 4.
In debt the plea shall be, that she hath fully administered; and reply, that she hath assets, never mentioning the husband.

33 H. 5, 31.

M. 31 E]. in
Com. Ban. If
the husband be
to avow, it must
be in the right
of his wife, ex-
ecutor, or ad-
ministrator.
Manfield's
Case. Dr. Ju-
lier, his Case.

10 H. 7, 20.

being administrator of her testator, if she have no executor; and so was it held in the first year of Queen Mary. Yea, though for any other goods which the wife had in her own right before marrying, the husband alone, without naming the wife, may maintain an action of trespass; yet, touching such goods as the wife hath as executor, the action must be brought in the names of the husband and wife, to the end that the damages thereby recovered may accrue to her as executor in lieu of the goods. So also must the replevin for those goods be in both their names. But although the husband be thus named with the wife, yet principally is it the suit of the wife; and therefore in such actions, or in debt by husband and wife, she being executor, if it come to trial by jury, the husband being an alien, yet shall he not have trial *per medietatem lingue, or alienigenarum*, that is, by half aliens, as in other cases where an alien is party to a suit is to be had. And where, to a wife made executor, power is given to sell land of the testator's, she may sell to her own husband, as was resolved in the time of King Henry the Seventh^(a), where the feoffees (it being land settled in use) were committed to the Fleet, for that they would not execute an

(a) If *cestuy que use* had devised that his wife should sell his land, and made her executrix and died, and she took another husband, she might sell the land to her husband; for she did it *en auter droit*, and her husband should be in by the devisor. See 2 Wilson, 402.—(C.)

estate to the husband according to the wife's estate. But of this I much marvel, since the law intends the wife so under the husband's command and subjection, that it holds not her disposition of land to him by will free, nor therefore of force; and how shall this then be conceived to be but a partial sale? Yet *volenti non fit injuria*, and he that will put such power into the hands of a woman under coverture, doth in a manner subject it voluntarily to the husband's will. And it hath been held by some, that even an infant's or feme-covert's conveyance, in such case of necessity, should stand firm and unavoidable, because of the condition express or implied, that the estate should be void if no such conveyance made.

¶ Feme-covert put out money in name of another, but for her own use; he whose name it was put out in is but a trustee: yet in law it is his money, and the wife hath no remedy for it but in a court of equity. Therefore the husband shall not have it as husband, but he may have it as administrator. March. 44.

Bro. Just. Cui in vita 15, she may sell to any other, but not to him.

Fenner Just. in Ban. Reg. Pasc. 27 El. & 34 E. 3 Bro. Cui in vita 15. No prejudice to them that it be good.

CHAP. XVIII.

TOUCHING INFANTS, AND THEIR MAKING OR
BEING MADE EXECUTORS.

- BEING now to consider of disability by age, for want of years in persons making or being made executors, let us first take a view of the several ages of men and women, to several purposes material in the law, judgment, and respect. And first, touching a woman: Wangford, in Henry the Sixth, his time, shows, and other books approve, that she hath six several ages respected in, and by the law. As first, the age of seven years for her father to have aid of his tenants to marry her. Next, nine years, to deserve dower, that is, that in case she be of that age at the time of her husband's death, she shall be endowed; but not if she be any thing under those years; the law being physically informed, that a woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the Parliament in the late Queen's time, when it was made felony to have unlawful carnal knowledge of any woman child under the age of ten years, it being then conceived, as I think, that no such could consent. The age of twelve years is a woman's time for assenting or dissenting to
- 35 H. 6, 41, b.
- 1.
- 2.
- 18 Eliz. c. 7.
- 3.

marriage, in more tender years had ; for so it appears by divers books, although Mr. Littleton hath here no distinction between male and female. The age of fourteen years is a woman's time to be in wardship, or not ; so as if she be any thing above those years at the time of her ancestor's death, she escapeth wardship. The age of sixteen years is her time of coming out of wardship, being once fallen under it ; for although had she been full fourteen, she had escaped it, yet not so being at the time of her ancestor's death, her wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full age of a woman, whereby she is enabled firmly and unavoidably to make grants or conveyances, is twenty-one years, as well as for the male ; before which time, be it that she being sole make a cofferment or other conveyance, or being married alien her land by fine, and her husband of full age join with her, yet is it *infirm* and *avoidable*.

Now of the male, or man, the first age material, and settledly resolved on, is twelve years ; for at that time each male is at the leet, to swear his fidelity to the King. This women do not, and therefore are they never said to be outlawed, but to be waived, because they have not this admittance into the law which males have. This hath been, as I think, the ground of that speech, *that women are lawless creatures*.

The second age of males is fourteen years, accounted by the law the age of discretion, especially material to two purposes, *viz.* first, that if

one under that age commit an act amounting to felony, yet is he to stand free from the attainder and punishment incident to a felon. Regularly it is thus; but, *non est regula quin fallat* (a). One

(a) It was the custom of many places formerly, that a boy after he had accomplished the age of fourteen years, and a girl after she had accomplished the age of twelve years, might then choose their own tutors if they pleased, and refuse the tutors appointed them by their father's will: but now, by 12 Car. 2, c. 24, every father, whether of the age of twenty-one years or under, may by deed executed in his lifetime, or by his last will and testament in writing, delivered in the presence of two or more credible witnesses, dispose of his children under the age of twenty-one years, and not married at the time of his death, for and during such time as they shall remain under the age of twenty-one years, or any lesser time, to the custody and tuition of any person or persons in possession or remainder (popish recusants excepted); and such disposition of such children, since the 24th of February, 1645, or hereafter to be made, shall be good against all and every person and persons claiming any such child or children, as guardian in socage or otherwise. *Ibid.* 11 & 12 Car. 2, c. 24.

And such person, to whom such children shall be disposed or devised, may have an action of ravishment of ward or trespass against such person as shall wrongfully take away or detain such child or children, for the recovery of them, and recover damages for the same in such actions, for the use of such child or children; and they are also empowered by the same Act of Parliament to take into their custody, to the use of such child or children, the profits of all the lands, tenements, and hereditaments of such child or children, and the custody and management of their goods, chattels, and personal estate, until the age of twenty-one years, or less time, according to the parents disposition; and may bring an action in pursuance thereof, as by the law guardian in socage might do. 12 Car. 2, c. 24.—(C.)

of much less years, having attained ripeness of discretion and discerning, shall incur the like attainder as one of full age, as was resolved in the time of King Henry the Seventh, touching an infant but of the age of nine years, who having killed another boy of the like age with his knife, and then hiding the slain boy, and excusing the blood found upon him by saying that his nose had bled; it was held by the judges that he was to be hanged as a felon, his such nonage notwithstanding. The other point, touching which ~~this~~ age of fourteen years is especially material, is touching an heir of lands held by socage; for in case such heir be under that age, he is to be in ward to the next kin; but if he be of that age, ~~he is not~~ be in ward at all, for that the law judgeth him to be of discretion at those years; and therefore a guardian in socage being in effect but a bailiff accountable, he hath no need of such an one other than such as himself shall choose.

The third age (in and touching males) material is fifteen years; for every lord of a manor, or one having freeholders in socage, or by knight's service, when his eldest son cometh to that age, viz. fifteen years, is to have of them aid for the making of him a knight, towards which every one holding by a whole knight's fee is to pay twenty shillings, and so rateably for more, more, and less, less; and each holding twenty pound's land in socage, is to pay the like sum, and so rateably for more or less.

The fourth age of males is the full age of

twenty-one years, which maketh him free from wardship, having lands held by knight's service descended unto him, and also makes him able to alien lands or goods, makes firm his bonds, statutes, recognizances, &c.; for although at fourteen the law judges him of discretion, yet doth it not hold him fully ripe till one-and-twenty.

5.
Oblitum.
Another of 60,
to exempt from
being compelled
to serve by
the stat. of la-
bourers. 23,
c. 1. W. 2, c. 3.
15 E. 1. No.
Na. Br. 165.

The last age of males respected by the law is seventy years; at which time sheriffs are to forbear to empanel them in juries; and in case they do not, such old man may have a writ to the sheriff, grounded upon the statute to that purpose made in the time of King Edward the First, commanding such sheriff to forbear the empanelling of him, and he may have an action to recover damages upon that statute. This is called by most a *writ of dotage*, a word, perhaps, anciently taken in good and favourable sense, *pro dotæ ætatis*, viz. a gift, privilege, or exemption allowed to age in favour thereof, and as a benefit. Having thus, by way of ingredient or introduction taken view of the several ages, let us now see wherein and how age is material touching them who are to make, or to be made executors, and what age is required thereabout (a). Master Perkins saith,

(a) It is the proper jurisdiction of the spiritual court to determine at what age an infant may make a will, and an executor of his goods; and if that court gives sentence against the law, the party grieved may have remedy by appeal, and not by prohibition. Jones, 210, *Brown's Case*. The age of fourteen is now allowed there and in Chancery.—(C.)

that one of four years old may make a will, and consequently executors; and his reason is, because the executors being to account before the ordinary, it cannot be intended but that the goods shall be distributed for the good of his soul. He speaks as if he only made an executor by his will, but did not bequeath any thing, but left all to the executor's conscience and discretion, which is not usual, though feasible, as before I have showed, or said, at least. But admit it were so, and no bequest at all contained in the will; yet, since at that age an infant hath no discretion to elect a fit person to distribute his goods, money, and other things, nor to make continuation of an executorship to another, to whom perhaps the infant was executor, I cannot see that his will should be of any force: but if he be of the age of fourteen years, being the age of discretion in the judgment of law, then I should hold him able to make a will, although yet he be an infant till twenty-one years, and can make no gift of land nor goods which shall be of force. And Babington, chief justice, to other purpose, makes like distinction between an infant of such tender years and one come to the years of discretion. So also, as before we showed, it is in the case of felony. And that way also sounds that which Hank. says, in Henry the Fourth, his time, viz. that an infant of eighteen years old may be a disseisor, as implying that his years may be so tender, that, as Candish saith of an infant, in Edward the Third, his time, he is not to be intended able to know or

Devises, f. 97.
No good reason,
for one may
make an ill ac-
count, espe-
cially having a
child's direction
for his doings.

9 H. 6, c. 6.

2 H. 4, 22.
40 E. 3, 44.

37 H. 6, 5.
11 H. 6, f. 40. 6.

discern between good and evil. Methinks, therefore, he should be at the least of the age of discretion, viz. fourteen years, who should be able to make a will, and consequently an executor (a). And the custom for an infant of fifteen years old to bequeath by will, hath, as to me it seems, affinity with this opinion, though there the case was of land in a borough, devisable by custom. And that way reflecteth the case in the time of King Henry the Sixth, where it was said, that an infant under fifteen years of age should not wage his law, viz. take an oath to acquit himself of a debt, or excuse his default in an action real. And farther reason of this opinion will arise out of the consideration of an infant made an executor.

Action against defendant, administrator during the minority of A. and the plaintiff shows that the said A. at the time of the writ brought was and is under the age of 21 years, and verdict pro quer.

Now touching an infant made executor, how young soever he be, the making of him so is not void (1); but yet the execution of the will, which is the performance of the office of an executor, shall not be committed to him till he come to the age of seventeen years, by the law spiritual, and till then (for that he is not able to do the part of an executor) administration is to be committed to

(a) An infant, at the age of eighteen years, or as some say, fourteen, may make this testament, and constitute executors for his goods and chattels. Coke's 1 Inst. 89, b; Swinb. 67; 2 Jones, 210; 2 Mod. 315; 2 Vern. 469.—(C.)

(1) Even in *ventre sa mere*, as executor or legatee. 2 Bro. Ch. R. 320; 1 P. Wms. 342; 1 Ves. 114; and 1 Cox. R. 248.—(E.)

some other (a): yet if it be a woman infant who is so made executrix (1), in case she be married.

Judgment arrested, for the administration

(a) Where one of the executors is an infant, and may not prove the will, administration *durante sua minore etate* may be granted to the other, who alone shall bring the action; and it is not inconsistent that he shall have the administration in such case; for that it is not granted as upon one dying intestate, for the will is proved, but only enables him to sue alone, because that the other is not capable to prove the testament, and so not to join with him, and he may sue alone; and *Hatton* and *Maskell's Case* was cited, which is entered in B. R. Mich. 15 Car. 2, Rot. 703, the roll of which was then brought into court, where it appeared to be so adjudged. But where both executors are at full age, there, although that the will be proved by one alone, the action is to be brought in both their names. Lev. 2 p. 240, *Colborne v. Wright*.

A. obtains a judgment in debt, he makes his wife and two daughters his executrices, and dies; the wife alone proves the will, reserving the power of administering to the two daughters, when they come in; the wife alone may sue a *scire facias*, she averring that both the daughters are under the age of seventeen. 1 Mod. Rep. 297.

Error in the Exchequer Chamber, upon a judgment in B. R.: a man having a judgment, made a man of full age and two infants his executors; he of full age proved the will, and alone brought the *scire facias*, setting forth the truth of the case, and had judgment, of which error was brought, and assigned that all ought to have joined in the *scire facias*: but by all the justices, upon advice with the civilians, it was not error; for the others may not prove the will during their nonage, and the judgment was affirmed, for the execution of the judgment shall not be delayed till the infant become of full age.—(C.)

(1) But the consent of her husband seems necessary.

ceaseth at 17, and so doth the action against the administrator.

2 Brownl. 247. Brownhead and Spencer.

Co. lib. 5, f. 29, b. M. 41 & 42 El.

to a man of seventeen years old or more, now is it as if she were of that age, and her husband shall have the execution of the will; and if administration were before committed during the minority of the woman, it shall now cease, as is said in *Prince's Case*(1). Yet I do a little marvel at these opinions, considering that these things are managed in the spiritual court, and by that law; and it intermeddles not with the husband in the wife's case: now by that law, and not our common law, comes in this limit of seventeen years. And I have seen it otherwise reported, in and touching the last point.

Co. l. 5, f. 22. But payment is to be made to the executor, and not to the administrator. M. 15 & 16 El. in Com. Bank. Rep. 67. Co. l. 5, f. 29.

Co. l. 6, f. 672.

Farther touching infants executors, and under the age of seventeen years, this is to be noted, viz. that such an one is not able as an executor to assent to a legacy, so as it may by virtue thereof settle in the legatee. Also, if administration be, during such minority, committed with special words of restraint or limitation, viz. that it is done to the use or profit of the infant executor, then no sale of lease or goods, or assent to legacy by such administrator, will bind or prejudice the

3 Bac. Abr. 9. It is indeed said, that she may execute, a naked authority without her husband. Co. Litt. 112, a. 6; 2 Ves. 191.—(E.)

(1) He is, however, disqualified from acting in his executorship until the age of twenty-one, and an administrator *durante minore ætate* appointed by the Ecclesiastical Court in the interim. Stat. 38 Geo. 3, c. 87, s. 6. It is said, an infant may be appointed even in *ventre sa mere*; and then, if there be more than one, they shall all be entitled. Godolph. 102; 3 Bac. Abr. 8; West Symb. 1, s. 633.—(E.)

infant executor; otherwise, perhaps, if the administration during the minority be committed generally. And if the testator himself, making an infant executor, doth also appoint another to be his executor during his nonage, expressing it to be only for the benefit and behoof of the infant executor, I doubt whether this temporary executor stand any whit restrained from what pertains to the power of an absolute executor; for there may be, perhaps, difference between him to whom the owner of the goods commits the government of them, though but for a time and in special manner, and an administrator so especially made by the ordinary, another being presently by the will of the owner or testator to have the administration, in whom for a time legal defect is found. But now let us pass over this age of seventeen, and consider of the infant between that time of his being admitted to take upon him the executorship, and his accomplishment of his full age of one-and-twenty. First, then, suppose that he doth release a debt due to his testator; whether shall this be good to bind him, and to discharge the debtor, as well as if the executor had been of full age, he now having proved the will, and being by the law spiritual approved an executor able? And this point coming in question in *Russell's Case*, in the late Queen's time, consideration was had of divers good reasons for enabling of this release^(a); as that an executor

H. 26 EL.

(a) Debt on bond to testator, defendant pleads a release

16 H. 6, 45, 21.
E. 3, 22.

Co. l. 5, f. 27.

represents the person of his testator, and in his right and power doth these acts and not in his own, and therefore his infancy, which is a state or condition of his own natural person, shall no more disable him than it doth the King, a mayor, or other head of a corporation. Also divers books were found to run that way, as well in the case of an infant as of a feme-covert. But upon great deliberation in the King's Bench, and upon conference had with the Lord Anderson, Manwood, and other justices, it was resolved and adjudged, that the release of an infant executor, without payment of the debt and duty, would not bind or bar him. First, for that if it should, it would be a wasting or devastating of the goods of his testator, and so would charge his own goods. Secondly, it would be a wrong, which an infant could not do by his release. Thirdly, it was no pursuit nor performance of the office or duty of an executor, but the contrary. And upon this judgment a writ of error was brought in the Exchequer Chamber, where it was agreed by all that the release was not effectual or binding, so as this point now had the resolution of all the judges of England. But it was agreed, that if payment or satisfaction had

by one of the plaintiffs (executors): plaintiffs reply, the release was without consideration, and he who released was within age at the time of the release made; and on demurrer it was adjudged for plaintiffs, that it was a void release: Cro. El. 671; *Knot v. Barlow*, Pas. 40 El. in C. B.—(C.)

been made, then the infant executor might have made a good acquittance and discharge (a); and indeed payment itself, if proved, brings discharge enough, except in the case of a single bill. Note; that the principal case adjudged was not a release of any debt or duty by specialty, but of trespass in conversion of goods found or taken in the testator's lifetime. But *posito* that this infant had assented to a legacy, whether will this bind him or not? For in the case of *Russell*, it is said, that all things which an infant doth, according to the office and duty of an executor, will stand firm; now it is part of his office to pay and execute legacies. Yet since this act amounts to a vastation or wasting of the testator's goods, as well as the other, in case there remain not goods sufficient for payment of the debts; and consequently here, as well as in the other case, the infant's own goods would become liable to his testator's debts, I doubt and incline that it is not, nor can stand effectual; for except in the other we admit a want, or possibility of want of assets or goods, the release could neither hurt the infant himself, nor do wrong to any other; and that admitted, this case is of like prejudice. Yet if these assets should be void, so also would be his payment of legacies; and how then were he an

(a) The release of an infant executor, if he receive full payment or satisfaction, is a good discharge for what he receiveth; but it is otherwise without payment. Co. Litt. 172.

—(C.)

able executor, at the age of seventeen years, to sue and to be sued for debts and legacies? And if upon suit it cannot be showed that debts will take up all, or disable the payment, then haply he may be forced to pay. *Quere*, notwithstanding whether these acts (though voluntary) stand as good upon *bono esse*, or conditionally, *viz.* if there be besides goods sufficient, &c. or that else the nonaged executor may have an action of account for the money by him paid to the legatee, and also avoid his assent, where that is only needful. But doubtless neither the assent of such executor, before the age of seventeen, nor any payment of a debt to him, could be good, although such act to or by another executor, before the proving of the will, would stand firm and good; for this infant wants not only proving, but also ability to prove his testator's will; yea, the will stands suspended, and the testator as it were intestate, whilst the administration stands in force, so that during that time nothing can be done by any executor; and therefore there is great difference between the cases. What if payment of a legacy be made to an infant, can he make a sufficient acquittance? This, I confess, is besides the point in hand; yet because it concerns infants and executors (though not infant executors), it is not amiss here to cast some thoughts and words upon the point, for that it many times perplexeth both executors and legatees. First, therefore, in case the infant be of the years of discretion, *viz.* fourteen, I hold it clear that any payment to him

made will stand good ; for that the law at that age holds him able to govern and manage his own lands held in socage, and consequently to receive the rents thereof ; wherefore, whether he who makes such payment have any acquittance or not, if he have proof of the payment, he is well enough acquitted from any second payment, and if, without payment he get an acquittance, it will not suffice, the infancy of him who makes the acquittance considered. Besides, if the acquittance be, as most usually they are, but signed only with the name of the maker, and not sealed, it is only an evidence or proof of payment, and no pleadable acquittance, because no deed ; so as it nothing differs from proof by witnesses, save that it is not mortal, as they. But now if the infant be under the years of discretion, what shall we say to a payment to him, especially if he be but three or four years old, or thereabout (1) ? Here I think caution is to be used by the executor generally ; and the surest way is, if he fear to

Notes of receipts, called acquittances.

Vide stat. 4, 5, Anne, c. 16.

(1) But now, by 36 Geo. 3, c. 52, s. 32, in all cases where, by reason of infancy, absence beyond seas, &c. the executor cannot discharge himself of a legacy, and the duty payable thereon, he may, at the expiration of the year, pay the same, after deducting such duty, with the privity of the accountant-general, into the Bank, to be laid out in the Three per Cents. and to be placed to the account of such legatee ; and this payment shall be a sufficient discharge for such legacy ; and such sum, with the dividends accruing thereon, will be transferred to the party entitled, upon petition, summons, or motion to the Court of Chancery.—(E.)

keep it in any respects, to pay it into the court where it is recoverable, viz. where the will was proved: yet the case so may be, as that this payment may not be at all safe for the executor. As put the case that he entered into bond or statute to pay all legacies by such a day to the several legatees: here, I think, the payment into the court spiritual sufficeth not, for that must make the receipt to be with some charge, which is in some kind an abatement; there I think, therefore, legally to secure the executor, the payment must be to or in the presence of the guardian, because of nurture, viz. him or her who hath (though not as guardian in respect of lands) the custody or education of the infant; for otherwise, to pay it into the hands of such a tender infant, separate from any governor or guardian, were to expose it to loss, both for that he is not able to count the sum, and for that he, yet not being come to discerning years, were, alike with Æsop's Cock, to part with pearls or coin for plums or trifles of no value. But in case no bond nor other collateral penalty lie upon the executor, or in case the bond or statute be only to perform the will generally, which nothing alters the course of payment, which by the will the law lays upon executor, then is not the executor put to any such payment, nor need pay without demand and acquittance, as in case of payment upon a single bill, or of rent-seck, where no distress can be taken, nor other penalty incurred. Yet in that case, if demand be, and acquittance ready to be given, let the

executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the acquittance in respect of nonage; for, as I have said, proof by witnesses may supply a nullity of acquittance, and much more the weakness or imbecility; payment according to the testator's appointment being the matter which acquitteth the payer, and this the executor may have testified under the hands of divers witnesses, expressing circumstances, so as all dying, he may continue safe from second payment as well as if an acquittance had, the witnesses whereunto are subject to mortality as well as the other. But herein courts of equity do often interpose helpfully for them who seek not evasion from payment, but only security in paying. And of infant executors, and by occasion thereof, of infancy in legators or legatees, thus much.

An infant executor cannot sue *per attornatum*, because he cannot make a warrant of attorney. But if one executor be of full age, he may sue with that other *per attornatum* (a).

(a) Debt by three executors, by attorney, of whom one of them was within age; the defendant pleaded, that he was within the age of seventeen years; upon which the plaintiff demurred, and two points were argued at the bar. First, if an infant, and other executors of full age, join in an action, if the infant ought to do it *per guardian*? Secondly, if the infant ought to be omitted, and the suit only in the name of those of full age? And the Court being divided, delivered their opinions severally, but judgment was given that the defendant *respondent ouster*. Lev. 1 p. 299, *Foxwist v. Tremaine*.—(C.)

1 Vent. 40.
1 Mod. 296.
2 Stra. 1220.

CHAP. XIX.

OF LEGACIES.

ALTHOUGH these be not recoverable at and by the common law, but most naturally at and by the law ecclesiastical ; yet by suits in courts of equity, as the Chancery and Courts of Requests, they are often obtained ; and of many things touching them, common law taketh notice, and hath manifold occasions so to do. We will, therefore, consider thereabout these parts or points, some whereof have been in part before touched, upon other occasions (a).

Co. Lit. 111.
Devise or legacy, what.

(a) *Devise* (from the French word *deviser*, signifying *sermocinari*, to speak ; for *testamentum est testatio mentis, & index animi sermo* ;) is, by the civilians, termed a legacy, and in that sense is a gift left by the deceased, to be paid or performed by the executor or administrator, after his death ; and it is called a gift, for that it proceedeth of the mere liberality and free good will of the deceased. And in that it is left, it differeth from other gifts, not only those which are called deeds of gift, executed in the life of the donor, but also from those gifts which be made in consideration of death, wherein the things given are delivered by the testator in his lifetime, to become their own to whom they are delivered, in case the testator die ; for legacies are not delivered by the testator, but are left to be paid or delivered by his executor or administrator.

1. Whether any legacy in certain, lying in *prender*, may be taken or had without the ex-

A gift in consideration of death⁽¹⁾, is where a man, in consideration of his mortality, doth give and deliver something to another, to be his in case the giver die: but if the giver do not make express mention of his death, they cannot be revoked, but take effect from the time of making the gift, if the same be not fraudulent. And if a person deliver goods,

(1) Such a gift is always accompanied with an implied trust, that, if the donor live, the gift shall revert to him; for it is made only upon consideration of death (11 Vin. Abr. 176; 1 P. Wms. 404; Pr. Ch. 269), although it so far partakes of the nature of an absolute gift, that no assent of the executor is necessary (2 Ves. jun. 120); yet, like a legacy, it shall not prevail against creditors; but it is not suable in the ecclesiastical courts. Stra. 777. To make this disposition effectual, there must be an actual parting with possession out of the donor, in general by corporeal delivery. 1 P. Wms. 404. 441; 2 Ves. 431. 442; 2 Ves. jun. 111. 120. Where, however, from the nature of the subject, that is not practicable, it is sufficient if the donor do all in his power to transfer, as by delivering bills of sale, key of warehouse, or trunk. Pr. Ch. 300; 3 Atk. 214; 4 Br. Ch. R. 72. And so an actual delivery is not sufficient, unless the donee have a continuing possession of the chattel so delivered. *Bunn v. Markham*, 7 Tunt. 224; and S. C. 1 Holt R. 352. Still less can a delivery merely constructive or symbolical have effect. 2 Ves. 440, *et seq.* Those chattels, therefore, which in themselves carry no value, except as evidences of contract, as bills of exchange, contract debts, &c. cannot be so disposed of. *Ibid.* But it is not yet decided how far the delivery of a mortgage-deed is a sufficient transfer of the interest. 3 P. Wms. 358, *et seq.*; Ambl. 318.

As the consideration is the death of the donor, any absolute gift, as by a check on a banker, payable at all events, and immediately, is not to be considered a gift of this nature (4 Br.

ecutor's assent, by the legatee, or him to whom it is bequeathed.

to be kept until he be dead, and then to be disposed or distributed *in pios usus*, in this case the person is executor of those goods so to be by him distributed.

Legacies may be given divers ways, either simply or conditionally; that legacy is said to be simple which is given without a condition annexed to it: and as in appointing an executor, it matters not after what form of words it be; so it is in the bequeathing of a legacy; for it signifies not after what form it be given, so that the testator's meaning do but appear, whether it be in goods and chattels, or lands and tenements. Swinb. p. 4, s. 4, n. 18.

What words are necessary in wills, to make an estate in fee-simple, fee-tail, or for life; and what in deeds; and how the intent of the party, in wills, is chiefly to be observed. See 1 Inst. 9, b; 4 Mod. 89; Style, 281; 2 Lev. 91; 1 Mod. Rep. 100; 1 Salk. 2. 6; Pasc. 1729; *Barry and Edgworth*, Cro. Car. 447; 1 Roll. Abr. 834.

"All my estate," in a will, passeth a fee. Ca. in Chan. 262, *Tirrel v. Page*; 1 Wilson, 333; *Frogmorton v. Wright*, Easter, 13 Geo. 3, 3 Wilson.

A devise to a man and his heirs male makes a good estate-tail. 1 Inst. 27, a. But the son of the daughter shall not inherit.

Where a devise to a man, and his heirs male, is a good estate-tail. 1 Inst. 27, a; *post* 172.

Where, by a devise to a man and his heirs male, the son of the daughter shall not inherit. Coke's 1 Inst. 25, a.

If a man devise, by his last will, lands or tenements to a

(4 Br. Ch. R. 286); but if it be expressed as for mourning, it proved that the gift was made in contemplation of death. 1 P. Wms. 441; and 2 Ves. jun. 111. Hence the wife of the party is competent to take this interest; for it becomes only absolute on the death of the donor. *Ibid.*; and 3 P. Wms. 367.

A person brought into England as a slave, held also capable; for he becomes free instantly on landing, and clothed with all the rights of a freeman. *Shanley v. Harvey*, 2 Eden R. 126.—(E.)

When an executor can or safely may pay, deliver, or assent to a legacy.

2.

man and to his heirs male, this, by construction of law, is an estate-tail, the law supplying the words, "of his body."

Where lands are given to a man, and the heirs male of his body, upon condition that if he die without heir female of his body, that then the donor shall reenter; this condition is utterly void; for he cannot have an heir female of his body so long as he hath an heir male. 1 Inst. 164, a.

A. deviseth land to B. for life, paying yearly to C. during the life of B. 6l. rent at Michalmas; and if unpaid, that C. might distrain for it. It seemed that this word *paying*, in his case, is not a condition for breach whereof B. should forfeit his estate, because a distress for the rent is given by the will to C. 1 Roll. Abr. 411; L. pl. 3.

A man devised lands to one for his life, and after to his next heir male, and to the heirs males of his body: agreed that he hath but an estate for life, because he had express estate for life devised to him, and the remainder is limited to his next heir male, in the singular number, and the right heir male of the devisee cannot enter for the forfeiture in the life of the devisee, for he cannot be heir as long as the devisee liveth. And the devisee by feoffment determining his estate or life by a condition in law annexed to the same, it cannot afterwards be revived, and therefore the contingent remainder was destroyed: but if tenant had been disseised and died, it had been otherwise. 1 Rep. 66, *Archer's Case*.

Lands are devisable according to the custom of several places; as in many places all, in some places only such as the devisor hath purchased.

In some places he may devise any estate; in some places or life only, &c. And *voluntas testatoris est ambulatoria usque ad mortem*.

Where a man hath devised, by his testament enrolled, a certain rent, to arise out of his tenement within the city of London, without clause of distress; yet, by usage of the said city, he to whom the devise is made may distrain, and avow

3.

Whether one executor alone may do it; and what if the executor be an infant, or woman-covert?

the taking, if the rent be behind. And in the same manner shall be done of all the ancient rents, called quit-rents, within the same city.

By the custom of London a foreigner, as well as a citizen freeman, may devise his tenements in London, which he hath in simple fee, to another in fee; but such devise may not be made in mortmain, unless by a citizen or freeman of the city. Dyer, 255, pl. 3.

A devise may create an estate otherwise than a gift can, yet cannot a devise direct an inheritance against rules of law; and the heir in tail male must make his conveyance by males only, and the female in tail female by females only. Therefore the safest way, when a man will entail his lands to the heirs male and female of his body, is to limit the first estate to him and the heirs male of his body, the remainder to him and to the heirs of his body, and then all his issues whatsoever are inheritable. 1 Inst. 25, b; 377, a.

Such estate as cannot, by the rules of common law, be conveyed by act executed by a man in his lifetime, by advice of counsel, cannot be devised by the will of a man who is intended in law to be void of counsel. 1 Rep. 85, *Corbet's Case*.

By will an estate of inheritance may pass without these words, *his heirs*; as if a man devise ten acres to another, and that he shall pay to his executors 10 l.; hereby the devisee hath a fee-simple by the intent of the devisor, albeit it be not to the value of the land. So it is if a man devise lands to a man *in perpetuum*, or to give or to sell, or *in feodo simplici*, or to him and to his assigns for ever. In these cases a fee-simple doth pass by the intent of the devisor; but if the devise be to a man and his assigns, without saying, "for ever," the devisee hath but an estate for life. If a man devise land to one, *et sanguini suo*, that is a fee-simple; but if it be *semini suo*, it is an estate-tail. 1 Inst. 9, B.

A feoffment to the use of his will, and to the use of him and his heirs, is all one.

When a man maketh a feoffment to the use of his will, he

What shall amount to an assent of the executor, and what to disassent, or disablement of assent.

hath the use in the mean time. Secondly, if in such case the feoffor by his will limit limit estates according to his power, there the estates take effect according to, or by force of the feoffment, and the use is directed by the will, so that in such case the will is but declaratory. But if in such case the feoffor, by his will in writing, deviseth the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will: for the testator had an estate devisable in him, and power also to limit an use, and had election to pursue which of them he would.

If a man make a feoffment to the use of his will, or to the use of such person or persons, and of such estate or estates as he shall appoint by his will; by operation of law the use doth vest in the feoffor, and he hath the use in the meantime, and is seized of a qualified fee, till declaration be made according to his power, and then the estate takes effect by force of the feoffment, and the use is directed by the will. But if such feoffor by will devise the land itself, without reference to his authority, there it shall pass by the will. 6 Rep. 18, *Sir Edward Clere's Case*.

A devise imports a consideration in itself, and therefore cannot be averred to be to the use of any but the devisee, if it be not expressed in the will. No more can a devise be averred to be for a jointure, unless it be expressed in the will. 4 Rep. 4, *Vernon's Case*.

Devisee of lands may enter into them without livery of seisin thereof to be made to him. 1 Inst. 112.

A devise without attornment good. 1 Inst. 111, 112, a; 322, a.

Where a devise is void in law by misrecital of a grant, and lack of an attornment, the Court decreed it good. *Bacon's Case*, Tothill.

All devises of land void, except in writing, with three or four witnesses. See 25 Geo. 2, c. 6, whereby creditors and

5. How a lease or chattel real may be given to one for a time, with remainder to another; how not.

legatees are made competent witnesses to wills. See 2 Stra. 1253. And the statute provideth, that *voluntas donatoris, &c. observetur*. But the 25 Geo. 2, extends not to wills disposing of personalty only. 17 Ves. 508.

If a man deviseth, either by special name or generally, goods and chattels real or personal, and dieth, the devisee cannot take them without the assent of the executors. But when a man is seised of lands in fee, and deviseth the same in fee, in tail, for life, or for years, the devisee shall enter; for in that case the executors have no meddling therewith. And the freehold or interest, in law, is in the devisee before he doth enter, and nothing in that case (having regard to the estate or interest devised) descendeth to the heir: but if the heir enter, or hold the devisee out, he may either enter, or have his writ of *ex gravi querela*. 1 Inst. 111, a.

It seems this writ of *ex gravi querela* doth not lie without a special custom, although by custom the land be devisable. F. N. B. 459, 4to. margin, post 170. Now the devisee may enter, and bring ejectment, since the statute 32 & 34 H. 8.

The writ *ex gravi querela* lieth where a man is seised of lands or tenements in any city or borough, or in gavelkind; which lands are devisable by writ time out of mind. Now if such lands be devised in fee-simple, or fee-tail, he to whom this devise is made shall have this writ, *ex gravi querela*, for to execute that devise.

The remainder in fee to a stranger; if tenant in tail enter and die without issue, he in the remainder shall have this writ. And the heir of the devisor, for want of issue, or he who hath the reversion, shall have this writ. F. N. B. 459.

Upon information that Stephen Newman, seised of lands, devised them to Trinity College, in Cambridge, for the maintenance of a scholar there, and in the will was this clause: "that if any by cavil shall hinder this devise, or that the same cannot go to the College, by reason of the statute of Mortmain, then I devise them to Robert Newman and his

Where an assent to the first, or one part of the bequest, shall imply or amount to an assent for the residue.

6.

heirs;" and under this pretence, that by the statute of Mortmain the College could not have them, Robert Newman entered, and held the possession of lands; whereupon the attorney-general brought this information, for to have the lands established with the College. And all this appearing upon the bill and answer, and it being a charity, it was held by the lord keeper, Bridgman, that it ought to be established with the College, by virtue of the statute of 43 Elizabeth, notwithstanding the statute of Mortmain, and notwithstanding the clause in the will; and so it was decreed. And the lord keeper said, that it did not differ from *Lloyd's Case*. Hob. 136; 1 Lev. 284, *Rex v. Newman*.

And it is truly said, that the first grant, and the last will, are of greatest force.

Where in one will are divers devises, the last shall stand : *Cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est.* 1 Coke's Inst. 112, 113.

This doctrine is exploded, and where the devise is to two, they shall be joint-tenants.

There is great difference between a feoffment of lands upon confidence, or to intent to perform his last will, and a feoffment to the use of such person or persons, and of such estate and estates as he shall appoint by his will; for in the first case the land passeth by the will, and not by the feoffment, &c. 1 Inst.

The fee-simple of the copyhold being limited to the use of the will of the copyholder, doth remain in the copyholder, and not in the lord. 4 Rep. 24, *Copyhold Cases*.

Devise is where a man, by his testament, giveth lands or tenements, or goods. And if the executor will not deliver goods to the devisee, he hath no remedy by common law; but he must have a citation against the executors, to appear before the ordinary, to show cause why he performs not the will of the testator.

For the devisee may not take the legacy, but it must be delivered to him by the executors.—(C.)

7. Of the manner of assents, and therein of assents conditional.
8. What manner of interest he in the remainder of a lease, after the death of another, hath during the life of that other; and whether he may dispose of it during that time, and how.
9. Whether this remainder can be defeated by any act of the devisee for life, or by the death of him in remainder first?
10. By what acts or accidents a legacy may be forfeited or lost, and therein of revocation, death before, &c.
11. Whether the executor's assent shall have relation to the testator's death, and shall make good a grant before made by the legatee.

If the executor give it to another, the legatee hath no remedy at the common law, per Priest. 37 H. 6, 30.

As for the first, we have before showed the assent of the executor to be necessary before any legacy can be had⁽¹⁾; for that debts are first to be paid, and that the executor is to look to, at his

(1) Certainly without such assent, express or implied, from particular acts, the legacy is not complete or perfect (3 Bac. Abr. 84; Co. Litt. 111; 1 P. Wms. 554; 2 Id. 645; 1 Atk. 598; 3 Id. 240); and *semble*, a slight assent is sufficient (4 Bac. Abr. 445; 2 Ventr. 358; 1 Vern. 460. And a constructive assent is equally effectual. Com. Dig. Adm. c. 6. 8; 10 Co. 47, b; Shep. Touch. 456; 1 Roll. Abr. 620; 3 P. Wms. 12; Leon. 130. And he cannot subsequently retract his assent, and after such assent an action lies against him for the specific chattel bequeathed. 4 Bac. Abr. 445; 5 Atk. 238; 3 East R. 120.

But an assent to a void legacy is itself void. Plowd. 296. And his assent before he is capable of giving it is of no validity. Com. Dig. Adm.—(E.)

peril (a). But hereto add a little out of Swinburne, a learned civilian, who saith, that in case any goods be in the hands or custody of *J. S.* and the owner doth bequeath them to him, then may he keep or retain them against the will of the executor, so as there be other sufficient goods in the hands of the executor for payment of all debts: but though thus, as it seems, it would stand in the ecclesiastical law, yet for that no property is transferred to the legatee without the executor's assent, therefore doubtless the executor may at the common law recover the thing withheld, or damages to the value against the legatee retaining it (b). Another case there is, wherein, as the learned civilian saith, the legatee may take to him the thing bequeathed lying in prender, viz. where other beast, or piece of plate, or other like thing, known and in being, and that is, where the testator doth expressly so appoint by his will.

But herein, doubtless, the common law, at and by which debts are recoverable against executors, will oppose the law spiritual; for else, by such appointment, the testator might cause all his goods to be taken by legatees, and that none should remain to pay debts. Yet if there be

It is said

Legatee of a term sues, and the executor no party, not joined, though it is charged that the executor hath assented.

1 Ca. in Chan. 277, *Moore v. Blagrove*.—(C.)

See also

(b) And a legacy is not attachable by foreign attachment.

Ca. in Chan. 257, *Chamberlain v. Chamberlain*.—(C.)

other goods beside sufficient for payment of debts, then indeed I see not how the executor can hinder such taking, without violating his oath, taken for performance of the will. If any say, that it is also a breach of oath in the other case ; I say, he observeth not that there such clause in the will, being against the law, is void, and consequently there is a nullity upon it, and it is as if no such thing were in the will, and so the oath extends not to it. And as a chattel shall not be transferred to a stranger, without the executor's assent, so if the devise be to the executor himself till he elect to take as legatee, it shall be to him as executor, as appears by the strain and argument of two cases in Plowden's Commentaries(a). And

(a) In ejectment and in evidence to the jury at the bar, the case was, that a man possessed of a long term for years devised it to his wife for life, remainder to trustees for his son for life, remainder in trust for the heirs of the body of the son, remainder to the right heirs of the son, and made his wife executrix. *Per Cur.* the wife took the whole term as executrix in the first place, till she agreed to the devise ; but it being proved that she said, that she would take the term according to the will, *per Cur.* it was an assent sufficient ; and a case was cited where, in the like case, the wife said, that the son was to have the estate after her ; it was resolved a good assent. But then the original lease could not be produced ; but being an ancient lease, the grandson of the lessor producing a counterpart, found among the other evidences of his grandfather, it was allowed for evidence, although that no witnesses were subscribed to it ; for Wyndham, justice, said, he had seen many deeds of the time of the reign of Queen Elizabeth, without witnesses ; then the title being made to the term by one as administrator, and no letters of

more lately in the King's Bench, the point being divers days argued, was at last so resolved by

administration produced, the book of the ecclesiastical court where it was granted being produced, in which was entered the act or order of the court for the granting of it, it was allowed good evidence. 1 Lev. 25, *Garret v. Lister*.

Where the question was on a will, whereby, after other bequests, this clause was added: Item, *All the rest of my lands, goods, and personal estate, I give to A. B. on trust, to give to my children and grandchildren, according to their demerits*. The devisee, who was heir and executor, gave the land to one, omitting the rest; and the question was, if that was a disposition according to the trust? The lord chancellor said, I take it for a rule, that wheresoever there is a demand in law or equity, there must be a certainty of the thing demanded to be adjudged or decreed. I sit not here to make the wills of men, nor to interpret them further than the wills go; and therefore, as to the settlement of the lands one, and not on all, I cannot alter; and so dismissed the bill as to that. Another question arose touching the personal estate, wherein the point was, that a citizen of London, being residuary legatee, dying, whether this, being but a legacy, which till election rested *prima facie* in the legatee, but as executor, should be subject to the custom, as the executor's own estate? The lord chancellor decreed it should; and said, I will make election for him. Mod. Ca. in Chan. 309, *Civil v. Rich*.

If the testator say, I will that *A. B.* shall have a horse; here the election belongs to the legatary: but if he had said, I will that my executor give to *A. B.* a horse, then the election belongs to the executor; and if the words of election be directed to neither of them, then the legatary shall make the election, if there be any such thing extant amongst the testator's goods as is bequeathed; and if not, then the executor is to make the election; and in case where the legatary chooseth, he must not take the very best, unless there be no more but two of the things extant; for so he may do

Welchden &
Elkington, Pa-
ramour & Yard-
ly, Portman &
Simmes Case,
Trin. 37 El.
All but Gandy
so agreed.

three judges against one. And the reason of Coke, at the bar, was very good; for here the executor sustains two persons, *viz.* an executor and legatee, and so all one as where the bequest is to another; for *quando duo jura concurrunt in una persona, æquum est ut si essent in diversis*.

As for the second point, it may have these two parts: first, when the executor is able to give such assent to a legacy; and, secondly, when he may do it with safety. As for the first, he is able before probate of the will to assent unto the execution of a legacy, as elsewhere is showed, and that although he be not of full age of one and twenty years: but if he be under seventeen years, so as he is not able to take upon him the office of an executor, and therefore administration is during that time to be committed to some other; ~~here~~ his assent is not of force or effectual, as we find in *Prince's Case*, to have been held in the case of *Pigot and Gascoin*. As for the second part, till all debts be paid, the executor may not safely consent to put the legatee into the lease or chattel devised, no more than he may pay money bequeathed, if there be not sufficient also to pay all debts. Of these things more is said elsewhere. Yet because the reader, or he that desires direction in these points, will look for them under

21 EL. Dy. 367.
Co. l. 3, f. 29.

when the testator grants him the election; and as the legatary may not choose the best, neither may the executor obtrude the worst of those things extant: and where there is no such thing extant, then the executor is to provide a competent thing for the legatary.—(C.)

this title, I thought not good here to be altogether silent touching them.

As to the third point, viz. whether the assent of one executor, where there be many, be sufficient, I see not how to doubt, since any one executor may give away any goods of the testator's, or release any debts due to him, therefore much more assent; which is no more or greater work, in effect, than an attornment of one lessee upon a grant of a reversion. And if there want to pay debts, he only who assented shall answer for it of his own goods, and not his companions. But if this executor be either under the age of seventeen years, or under coverture, viz. a woman married, such is not able to give a good assent to bind the others, no, nor themselves, for then thereby the infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husband's assent is sufficient where the wife is executrix; for his act, whom she hath chosen to be her head, may prejudice as well her as himself; yea, though she were within age, yet he being of full age, his assent will stand good. But if he or another executor in his own right be above seventeen years of age, or else under twenty-one, I doubt whether now his assent will be sufficient, at least except the case be put, that there be assets sufficient, which perhaps there may be material, though not in the other. See more hereof after, in the title of women-covert and infants executors.

6 H. 7, 5. If the bequest be to one of the executors, he may take it without assent of his companions; yet if a debt, his companion may release. H. 48 E. 4, 14, 15. So held where but one of the executors during non-age assented, in the case of Rhetorick and Chappel. H. 9 Jacob. Rot. 87. in B. R.

As to the fourth point, first, there may be an assent and election implied as well as express; for if in the devise or bequest, the legatee be appointed to do some act, as in respect of the legacy, and the executor doth accept the performance thereof, this amounteth to an assent. So if the devise be to an executor for the education of some children, which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as executor, as appears by the case of *Paramour and Yardley*, Plowden, 543. So if a horse be bequeathed, and one offering to buy him of the executor himself, he directeth him to go and buy the horse of the legatee: or if the executor himself offer money to the legatee for the horse, this implieth an assent that it should be the legatee's by the will; and so was it held in the case between *Low and Carter*, where the devisee of a term did grant it to the executor; and this acceptance of a grant from him, was held to imply the executor's assent that it should be his to grant. But I see not well how that should be law, which in the later part of the Lord Dyer is found, viz. where a term was devised to *J. S.* and he was made executor, and after the death of the testator entered and occupied the lands a whole year without proving the will, that this was an election to have it as devisee, and not as executor (*a*). For first, he

(a) In the special verdict, in *Manning's Case*, the first devisee *cadem Maria dixit, quod si ipsa obiret tunc, pced.*

THE OFFICE OF AN EXECUTOR.

A good right to the term as executor before
bate, and so might clearly in that right have
en the profits, although it had not been devised
bequeathed to him, and that before any will
ved. Secondly, he could not by right have it
legatee, without assent of himself or some
er as executor. Therefore this general ac-
tation can determine no election, as elsewhere
held. As for disassent, or disablement to as-
t, as if the executor do once declare his
ent that the legatee shall have his legacy, he
y then enter into it or take it, notwithstanding
executor's countermand or revocation of his
ent after. So, on the other side, I think, if he
y and expressly deny that the legacy shall
e effect, he cannot after make a good assent
eunto, for that election once made must stand
emptory, be it refusal to assent, or assent. Yet
re of this, for that the refusal to assent may
hecked by sentence or decree in the spiritual

us (viz. the remainder-man and administrator after her
de bonis non, for she was executrix), *haberet firman et*
in. præd. Vide 8 Co. 94, *Manning's Case*; see Co. Lib.
o. The executor, being devisee for life, said, the
ould have it after her death; and he entered and
nistration, she dying intestate; yet held assets in
is M. 19 H. 7, Rot. 318. See Lib. Intr. 321. One
third part of his goods to *A.* with whom the ex-
counted for the amount, and *A.* sued for that sum
but no judgment upon demurrer. Tr. 37 El. in
here bequests to the executor himself. Tr. 37 Eliz.
ill bequeath it to *J. S.* this is an election to have it
—(C.)

So if the executor take a new lease, his assent after is void. Tr. 37 Eliz. Carter's Case, 19 El. Dy. 359.

court, or court of equity, and so an assent be enforced. But if the power of assenting be legally lost by the means aforesaid, *viz.* disabled, I see not how any legal interest can be transferred by that compelled assent, howsoever decreed. And what is said of a legacy bequeathed to another, the same may be understood in case where the bequest is to the executor himself, and he makes his election to have it as legatee, or as executor(1). But if where a horse is bequeathed to A. the executor, after the testator's death, doth ride the horse, or use him in the coach or in the plough, I do not take this to be any such disagreement to the execution of the legacy, as that the executor cannot after assent to the legatee's having thereof, no more (though it be somewhat more) than where a drinking-cup is bequeathed, and the executor after the testator's death doth use it to drink in : nay, if a lease of land be bequeathed to A. and the executor continueth the depasturing of the testator's cattle therein, yet is not this any disagreement to the execution of the legacy(2). But if this lease-land were let out by

(1) As where he says, he will take it according to the will (1 Lev. 25), or do any act in pursuance of the bequest, or perform the charge, it is an implied acceptance of the benefit. 1 Roll. Abr. 619. 920; 1 Leon. 216; Plowd. 539. 544. So the exclusion of a co-executor in the subject-matter (Dyer, 277, b.); a taking part as residuary legatee, is an assent to the whole. 2 Roll. Rep. 158.—(E.)

(2) So it is not to be collected from a mere ambiguous

r from year to year, and the executor dis-
 th the tenant, and taketh it into his hands
 year's end, this I conceive to be a disassent
 legacy; and so also, perhaps, may his
 or distraining for any rent thereupon due
 the testator's death. Yet am I not resolute
 e disassent is so peremptory and unchange-
 the assent, remembering the case in King
 the Eighth his time, where a term being ^{14 H. 8, 23.}
 d by a lessee conditionally, so as the assent
 lessor could be had by such a day; though
 sor's assent were at one time denied, yet
 it be yielded at another, so as it were at
 me before the day. But yet there it was
 hat if no time of assent were limited, then
 press denial or refusal would be peremptory,
 the refusal were expressed to the party to
 the assent was to be given, otherwise, if it
 out in speech to or amongst strangers. This
 the former case, 19 Eliz. give the best light
 point that I remember. Now for disable-
 to assent, it was held, in the fore-mentioned
 of *Low* and *Carter*, that where a term is
 athed to *A.* and after the testator's death the
 or takes a new lease of the same land for
 years in possession, or to begin presently;
 y this was the term left by the testator sur-

Dy. 359. After
 choice once
 made, no varia-
 tion.

onsistent with either character (1 Roll. Abr. 620); or
 entry on a term; but if he grant it as executor it is
 tion in that capacity. 1 Leon. 216.—(E.)

rendered and drowned, so as it could not pass to *A.* by the executor's assent after.

As to the fifth point, *viz.* in what manner a lease for years or other chattel real may be bequeathed to one for a time, with remainder to another (*a*), it hath been heretofore much doubted, when a lease for years was bequeathed to one for life, or for so many years as he should live, whether the limiting of a remainder thereof, after his decease, were of any validity in law or not (*b*). And this doubt had this ground: any estate for life, in the judgment of law, is greater than any term for years; therefore when a termor hath by his will given his term, or his house or land, which he so holdeth for years, to one for life, or for so many years as he shall live, this testator and devisor hath not, in the judgment of the law, any estate remaining

(*a*) That a legacy may be given from a certain time, or until a certain time, albeit the legatary die in the mean time, before the day come, yet the executors or administrators of the legatary may recover the same when once the day is past, as the legatary himself might have done, if he had lived so long; unless the meaning of the testator be to the contrary, or that it be such a thing as cannot be transmitted to the executor, as personal service. But if the legacy be given after an uncertain time, as where the testator gives to *A. B.* 100*l.* when his son shall die, or the like; there, if *A. B.* die before the time come, there the executors or administrators of *A. B.* can then recover nothing. *P. Swinb. p. 4, s. 17.*
—(*C.*)

(*b*) In a will, if there be a condition, and after that a limitation, the condition must be limited accordingly. *Dennis v. Kemp, Mich. 16 Car. 2, Calthrop, 3.*—(*C.*)

in him; and therefore it was thought very hard for him to give or limit a remainder to another. But after many arguings or debates it was in the late Queen's time resolved, that such a remainder was good; and that if the first devisee died before the term expired, that then he to whom the remainder was limited might enter and enjoy the residue of the term. As for the giving of part of the years to one, and the residue to the other, *viz.* if the term being twenty years, the lessee bequeathed ten thereof to his wife, and the remainder to his daughter; of this no doubt ever was but that it was good; for that after the first state limited there remained a further term, *viz.* ten years more in the devisor, whereof he had power to dispose; whereas in the other case, after the term limited to one for life, there remained but a possibility that this life should not take up the whole term. But now put we the case a third way, *viz.* that the termor deviseth or bequeatheth the thing in lease to one child in tail, with remainder to another, and dieth, and the first entereth and dieth without issue; now whether shall the next in remainder, or the executor of him so dying, have the term residue? And this case came in question, and was adjudged about the middle of King James his reign, in the Exchequer: for there, Master Hamond, holding by lease for years from the Crown the manor of Akers in Kent, devised the same by his will to Alexander Hamond, his eldest son, and the heirs males of his body, with remainder to Ralph Hamond, another son, in

Plow. Com.
520 & 522.

Both Alexander and Ralph were executors ; but that makes no difference.

like manner, and the like remainder to Thomas Hamond, and made the said Alexander executor, who after his father's decease elected to take as legatee ; and after Ralph Hamond died, leaving issue male, and making his wife executrix : Alexander, not having issue male, granted the whole term by deed to *B.* and *C.* for the behoof of himself and his wife, during their lives, and after to the use of his youngest daughter, whom Sir Robert Lewkenor married. Then Alexander dying without issue male, the wife and executrix of Ralph Hamond entered, claiming the term ; and being kept out, sealed a lease ; whereupon an *eject. firma* was brought, and the jury appearing at the bar in the Exchequer found a special verdict in effect *ut supra*. And in argument of this case, first, the main question was, whether the case were all one in law with the former, where a term was devised to one for life, with remainder over, so as by the death of Alexander Hamond without issue male the term should go to the next in remainder, as in the other case, by the death of the devisee for life dying within the term, it should do ? And on the plaintiff's part it was urged to be all one, so that by virtue of the bequests *supra*, Alexander had an estate to him and his executors only so long as there should be heirs males of his body ; and he dying without such issue, the term remained to the executors of Ralph, who had the remainder in like manner, and left issue male, which still lived, and so that state of Ralph yet had continuance ; for it was admitted by the

counsel on that side, that the term could not go to the issue male of Ralph, according to the words and intent of the will, since it was impossible to make a term descend without an Act of Parliament. This, therefore, they said, the law should work, which was nearest to the intent, *viz.* that after Alexander's death it should go first to his executors and assigns, so long as issue male of his body doth continue; and for want of such issue, then to Ralph, his executors and assigns, so long as his issue male should last; and therefore, in this case, the issue male of Alexander failing, the executor of Ralph, whose issue male faileth not, should enjoy the term; and so judgment ought to be given for the plaintiff, being lessee of that executor. On the other side, it was said by the defendant's counsel, that this case differeth much from the other case, where the term or land held by lease is given but for life to the first, with remainder to another; which case, as having been often resolved, was clearly admitted to be good law; for in that case the intent of the testator might and did take effect. But in this case, if the land should go to the executors and assigns of Ralph Hamond, it must go against the intent of the testator, whose mind and will was, as it appears by his words, that it should go only to the issue male of one son after another, and not to any executors. Now then, since this intent was so contrary to the rules of law that it could not take effect, therefore it must be void, and so all the words of heirs male standing void,

Windsmore and
Holford vel
Holborn, M.
28 & 29 El.
argued, and
Tr. 29 El. ad-
judg. Winds-
more v. Hub-
bard. Pasc.
29 El. Cro. El.
p. 57.

the will is to be construed as a sole and absolute gift and bequest to the said Alexander, and consequently the term must go to his executors and assigns. And for this point, resemblance was made to a case resolved in the King's Bench, where a lease was made by indenture to *A. habend.* to *A. B.* and *C.* for their lives: now because *B.* and *C.* could take nothing, it was resolved that *A.* should not have it for their lives, but for his own only. This case was said to come very close in reason to the case in question; for as here the intent of the lease was that *B.* and *C.* should be estated for their lives, and, since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named, and their lives shall not stand as a measure for the estate of *A.*; so in the other case the intent of the will being that the lease or land leased should go to the heirs males of the body, first of Alexander, and afterwards of Ralph, since this cannot be, therefore the words and name of heirs males should stand for a mere blank and cipher, and not to measure out any state to the said Alexander and Ralph, and their executors and assigns. Also it was said on the defendant's part that an estate for life in the judgment of law is of so short and uncertain continuance, that if *A.* make a lease to *B.* for his life, and after makes a lease of the same land to *C.* for years, now shall not this later lease be void absolutely for any part of the term, but shall stand in expectation of the death of *B.*; and, as soon as he

shall take effect immediately : whereas if lease to *B.* had been for ten years, or any like term, then the lease to *C.* should have been void for so many years of his term. Thus it appears that a state for life is very momentary in the eye of law, and not reputed of any continuance so much as for a day. But it is otherwise of an estate-tail ; so that if *A.* having given land to *B.* in tail, doth after (without indenture) make an estoppel to make a lease to *C.* for forty-one years, and then *B.* dieth without issue during the term, yet shall not the lease take effect, as if it was utterly void at the first making. For an estate-tail, being an estate of inheritance, may by the intendment and judgment of law have continuance for ever, as appears both by the case of *Is and Lambert*, where it is held within the scope of chantries, which speaks of gifts to have continuance for ever. Therefore a reversion upon an estate-tail is no assets, nor giveth cause of reversion ; otherwise in all these cases it is touching a reversion expectant upon a state for life. Again, as said by the defendant's counsel, that an estate may be limited to *A.* and his heirs during the life of *B.* with remainder to *C.* as in *Chudley's* case was resolved : but if land be given to *A.* and his heirs so long as *B.* shall have heirs of his body, male, with remainder over to *C.* this remainder is utterly void. So as there is in the eye of law, a great difference between the continuance and continuance of an estate-tail, and an estate for life. And if (which is worth the

observing) a fee-simple cannot afford a remainder to be drawn out of it after such a gift to one and his heirs, during the continuance of an estate-tail, or of the measure thereof (*a*); much less can a term yield such large thongs to be cut out of it as a remainder after an estate to one so long as he shall have heirs of his body, or heirs-males, which is all one. And in this case the remainder was held void by Baldwin and Shelly, though Englefield were of a contrary opinion, as the Lord Dyer sheweth. Further, it was said, that if such a conveyance by will should stand good, it would raise a perpetuity not to be cut off by any recovery.

But whereas the case of *Hamond* hath been related before, so as by way of admittance it was argued as a gift and bequest to Alexander Hamond and the heirs male of his body, with remainder in like manner to Ralph; the truth of the case was, that the words of the will were only to Alexander and his heirs males, (not speaking of his body) and so to Ralph; which, as was urged by the defendant's counsel, made the case stronger against the plaintiffs; for admit that the former way Alexander should have had but a state determinable upon the continuance of his issue males, yet here

(*a*) If I devise a rent to a man, and the heirs of his body, and then devise it to another to begin after that, this is an executory devise, and not a remainder, and cannot be cut off by a common recovery. *Smith v. Farnaby, Calthrop*, 53—(C.)

not so; since the reason why in wills such a devise being made, the law should supply the words of his body) is only to make an estate-tail to the issues male, according to the testator's intent. Now in this case of a term for years so bequeathed, no estate-tail could possibly be, though these words had been in the will; and therefore the motive to the law failing, no such supply will be made by the law, since it would be to no purpose; consequently, here was neither estate-tail, nor issues or heirs male of the body, on whose continuance this estate of Alexander should be determinable. Therefore it was an absolute and total bequest of the term to Alexander for ever, viz. so long as the term should continue; for as a bequest to one for ever is as much as a bequest to him and his heirs; so a bequest to one and his heirs is as much as if it had been to him or ever.

And this case, after six arguments on each side the bar, (if I much mistake not) was upon argument by the barons adjudged for the defendant the Lord Chief Baron Tanfield and Mr. Baron Myle, Mr. Baron Denham (who only heard, I take it, one argument on each side, made of those in respect of his coming into his place, the former arguments) being of the contrary opinion; and the judgment proceeded upon the point formerly touched, that, as this case was, the estate of Alexander did not end by his death, but remain to the executors of Ralph. Other points were stirred, which will be touched upon

in other divisions after, in this chapter. It will be observed that I do more fully express reasons and points enforced on the defendant's part than on the plaintiffs, wherefore let these two reasons be accepted. First, that I better could relate that than the other, being the first who argued for the defendant, and hearing little of that which was by others said on either side after, nor hearing the courts; *nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the defendant's part, to prove that this case differeth from the common case of devise to one for life, with remainder to another.

Plow. 545. 6.
Co. lib. 10,
f. 47.

We are now come to the sixth point, *viz.* that where house or land held by lease, or the profits thereof, or the lease or term itself, which in a will makes no difference, is bequeathed to *A.* for life, or for some part of the term, with remainder to *B.*, and the executor assents that *A.* shall enjoy his bequest whether this shall enure to *B.* also, since without the executors assent no legacy can take effect. And it hath been resolved that this assent shall be effectual as well to all the remainders as to the first estate: and so, according to former resolutions, it was admitted in *Hamond's* case, that Alexander his assent to take as legatee sufficed (if the bequest had been good) for the remainder to Ralph and others. And the reason of this doubtless is, because here the particular estate and the remainder are all but one estate in law; they make but one degree in a writ of entry, nor shall have but one year and a day to enter for

mortmain. And an attornment to the grantee of a rent or reversion for life, with remainder over doth enure also to the remainder, which being assent hath much affinity to that of the executor, each tending to perfect the grant of another man. Now then, whereas it was urged in *Hamond's* case, that the state limited to Ralph should take effect, not as a remainder, but as a new estate to commence futuramente, *viz.* when Alexander should be dead without issue male: if it could be admitted to be so, then could not the assent of the first estate to Alexander have enured to this, since to Ralph in remainder it worketh as being one estate with the first, which reason must fail the other way. This difference, between a remainder and a new estate future, brings to my mind the case of a rent by way of new creation, granted by *C.* out of land to *A.* for life, or in tail, with remainder to *B.* In like manner it hath probably been held, although this limitation to *B.* cannot be good by way of remainder, because *C.* had no estate in the rent remaining with him when he made the grant to *A.*, yet should it be good by way of a new grant and creation to commence futuramente. But this doubtless cannot so be but with a difference. For if the grant were by indenture between *C.* on the one part, and *A.* only on the other part, now *B.* being no party to the deed can take nothing by it, except by way of remainder, but if he were party to the indenture, or if the grant were by deed-poll, to which all men are alike parties, then it

haply may enure as a future grant to *B.* This is not impertinent.

Now as the executor's assent to one cannot enure to another, though of the same thing, except by way of remainder, so neither can it any way where the things are not the same, except in very special cases (1). As if a termor bequeath a rent to *A.*, and the land itself to *B.*, the executor's assent that *A.* should have the rent is no assent that *B.* should have the land. Yet I think the executor's assent that *B.* should have the land doth imply the assent that *A.* should have the rent.

Plow. Con. 521,
in *Bret. & Rig-*
den's case. So
of common or
other profit.

1. For that the restraint imposed by the law against the passing of a chattel by a will without the executor's assent, being out of respect to the payment of the testator's debts, now if the land should pass to *B.* it is no more available to the testator's debts that it pass discharged of the rent, than charged. 2. Since the gift and bequest was of the land charged with the rent, therefore if this bequest shall take effect, it shall carry the lands according to the testator's intent, *viz.* with this charge upon it: for what else doth the executor in this, but assent that the will of the testator herein doth stand and take effect?

(1) Where executor had a term devised to him, with a leasing power which he had incorrectly executed, it was held that in the absence of any direct assent it should not be implied, but that the lease might take effect out of his interest as executor. *Doe v. Sturges*, 7 Taunt. R. 217.—(E.)

and consequently *B.* must take the term according to the will, and not in any different or contrary manner.

Next we are to consider of the manner of assents by executors, which hath some affinity with the fourth point. But here we shall consider only of assents conditional. Now to this purpose we will cast our eyes upon two sorts of conditions, viz. precedent and subsequent. As for the former, an executor may to a legatee absolutely give assent upon a condition precedent, as thus: I am content, that if you can get and bring into me such a bond wherein the testator stood bound to *J. S.*, that then you enter upon the term, or take the corn or cattle to you bequeathed. So of other like conditions which may precede the assent: as, if you can get the assent of my executor, or, if you will pay the arrearages of rent to the lessor behind at the testator's death, or, if you will pay the wages already due to the servants attending about the cattle or corn to you bequeathed; in this case if the condition be not performed there is no assent, and therefore the conditioning in this manner is good. But if it be on a condition subsequent, as thus, I do agree that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a creditor of the testator; now the legatee entering into or taking the thing bequeathed shall not lose it again by failing to perform the condition afterwards; for the executor by his assent cannot make that legacy conditional which the testator gave

absolutely, no more than he can make the bequest to be absolute which the testator gave conditionally, except by a release made of the condition. As in other things, so in this, the executor's assent is like to the attornment of a lessee, which cannot be upon a condition subsequent, where the grant is absolute, or without condition, though yet he may to his attornment prefix a condition precedent.

In the eighth place we are, touching the bequest of leases or chattels real, to consider what manner of interest one to whom a remainder of a term after the death of another is limited hath, and whether he may grant the same, or dispose thereof during the life of the first. And as to that, it is clear that he hath but a possibility of remainder, for that possibly the whole term may be spent in the life of the first, to whom during his or her life it is bequeathed: now a mere possibility is not grantable. Therefore was it resolved in the late Queen's time, where he in remainder granted or sold his estate or interest to another during the time of the first, that this grant was utterly void, because a possibility cannot be granted (a). But whereas some opinion in that

9 Eliz. Fulsey's case.

(a) Doctor Berry seised in fee, by will devised the land in question to Serjeant Fountaine, and his heirs in trust
1. To sell part for payment of his debts. 2. Till the debts paid, to pay 100*l.* per annum to his natural daughter Mary, and after the debts paid 300*l.* per annum for her life; and, if she have children, to convey successively to those children: if sons, at their full age; if daughters, to them all; but so,

case was delivered, that this possibility could not be released, no more than granted ; it hath since been resolved, that he in the remainder, by his deed of grant or release of the devisee for life, may make his estate, which before was determinable by his death, to be now absolute, so as

Lampet's case,
Co. lib. 10,
f. 48.

as the husband she marries takes the name of *Berry*. 3. For want of such issue, or if such issue die without issue, he devises Hemsworth and Kingly Park, the lands principally in question, to be conveyed to the eldest son and heir of his nephew John Cater, and the heirs of such eldest son ; and gives the said eldest son an annuity of 40 *l.* per annum, till such estate shall come to him : but if he claim any thing during the life of Mary, or any of her issue, then both father and son to be excluded from having any thing out of his estate. The eldest son of John Cater was Anthony, who had two sisters, the defendants Bradshaw and Todd, daughters of John. Anthony died, and left issue John his son, who in the life of Mary devised the lands in question to the plaintiff, and died without issue. Mary after died without issue : the heir of Fountaine conveyed the lands in question to Bradshaw and Todd, sisters of Anthony, and heirs of him and also of his father John. Bishop brings this bill to have the lands conveyed to him, supposing the equity to have this estate was vested in Anthony, and so well devised to him by John the son and heir of Anthony. But the Lord Keeper, assisted by the Chief Justice Treby, and Powell, Baron of the Exchequer, after several arguments and long consideration of the authorities cited on both sides, resolved, that John had no estate devisable, but a mere possibility during the life of Mary, or any of her issue, and so the devise to the plaintiff void, and the lands well conveyed to the defendants Bradshaw and Todd, sisters and heirs of Anthony, and dismissed the bill, but without costs, provided he acquiesce and give them no further trouble in this court. Lev. 3 p. 427, *Bishop v. Fountaine*. 7 W. 3.—(E.)

it shall continue to his executors, administrators and assigns, after his death during the whole term. It may be that what was conceived, in the said case of *Fulsey*, negatively of the validity of a release by him in the remainder, might be meant, or perhaps expressed of a release to him in the reversion: but surely (methinks) though he could not surrender, yet his release or defeasance to him in reversion or remainder, having the freehold or inheritance, should dissolve or destroy this term residue after the death of the devisee for life; so as there the freehold should be discharged thereof. But *qu.* for I have not known this in question. As for the other point in *Fulsey's* case, it was in the said later case of *Lampet* confirmed and admitted for good law, *viz.* that this possibility of remainder could not be aliened nor conveyed to a stranger.

Plow. 522,
Welcden &
Elkington.
10 Eliz. Dy. 277.
12 El. D. 359.
Co. 8. El. D.
253, & 33 H. 8.
Br. Chattels 23.

Now we are come to the ninth point, *viz.* to examine whether any act of the devisee for life can frustrate or defeat him in the remainder of the term, and whether the act of God, *viz.* by the death of him in the remainder before the first devisee for life, shall defeat it. As to the first, it hath divers times been resolved, that no grant made by the first man can cut off or defeat the second, though formerly it were held otherwise: but according to the late resolution was it also held or admitted by all, in the said case of *Hamond*, where was such a grant. And as this cannot be done by any direct grant or alienation, no more can it by an indirect or implied, as by taking

of a new lease, which is a surrender in law of the old lease, no more than by an express surrender; nor doubtless by outlawry, whereby the term of the first devisee is settled in the Crown. But if we put the case further, of waste committed by the tenant for life, or breach of condition by not payment of the rent, or otherwise; these for the whole in the later case, and for the part wasted in the former, do so destroy the lease, and put the reversion *in statu quo prius*, as that all remainders must needs fail: so of a feoffment, or other like forfeiture by fine. As for the death of him in remainder, it was urged in the case of *Hamond*, that since it was but a mere possibility, if it could not take effect, and become an estate in the life of him to whom it was limited, it could not settle in his executor: and to that purpose were cited the case of the *Rector of Chedington*, and more expressly, as resolved in the point, the case of *Price* and *Atmore*. But the court resolved, (and found former resolutions in other courts that way) that the death of him in remainder did not hinder, but that it may settle as well in the executors upon the death of the devisee, as it should have done in himself, if he had over-lived the first devisee for life. If the lessor enter and levy a fine, and the devisee for life enter not, nor claims in five years; he in the remainder may enter, as having a right futurely accrued.

In the last place we intermeddled only with leases bequeathed, wherein yet is to be under-

Lib. 1, 153,
Welcden &
Elkington
ubi sup. But
there the point
was never ques-
tioned, though
such death was
there.

Of forfeiture,
revocation, and
other loss of le-
gacy.

stood, that what thereof is spoken is to be extended to and understood of all other chattels real, as wardship of body and lands, estates by extent upon statutes or judgments, terms, otherwise than by lease, in fairs, markets, rents, annuities, commons, advowsons, and other profits; yea, one single next avoidance of a church. Now we come to consider of bequests personal principally, if not only; *viz.* how such may be forfeited, lost, or revoked. First, then, we will consider of the acts of the legatee; secondly, of the acts of God; thirdly, of the acts of the testator. The legatee, as from the civilians I learn, may forfeit his legacy by his miscarriage towards the will (a); as, if he uses means to have it concealed and kept from being known, and consequently proved (1). So if he accuse it of

(a) Also, if any shall exhibit a false testament, or any wise pervert a true testament, by adding, diminishing, changing or interlining the same, and is openly convicted of such crime, they shall be thereby excluded from all benefit accruing to them by such testament.—(C.)

(1) The destroying, &c. of wills is now also punishable by statute 7 & 8 Geo. 4, c. 29, s. 22; by which it is enacted, that if any person shall during the life of the testator, &c. or after his death, steal, or for any fraudulent purpose destroy or conceal any will, &c. whether the same relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and liable to any of the punishments in the Act mentioned.—(F.)

falsity (a). So, again, if he deface or destroy the will. Also, if being by the will appointed to be tutor or educator of a child, he refuseth so to be. So saith Master Swinburne: but Sylvester Prierius seems to me opposite in that, where he saith; *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a condition from words conditional, whereas the other without words conditional raiseth a condition implied (1). Lastly, if the legatee presume too far upon the strength of the bequest to him, so as he taketh the thing bequeathed without the consent of the executor, thus also doth he for-

Swinb. de test. 352, 353, exceptas tutor or guardian he refuse.

Sum. Sylv. 283.

(a) When any one intends to plead any thing against the validity of a testament, they ought to do it at the time of proving it, or within a year after; unless they were at such time infants, or in travel beyond the seas, so as they could hear nothing of it, and then they shall have six months after they return from travel to plead against it, and the minors a year after they come to full age: and if such parties exceed their limited times, then they are excluded from any remedy, unless it be in case where the testament was not at first proved in form of law, but after the common form; for then they must cause the testament to be proved over again, at any time within ten years, and allege what they can against it. *Refor. Leg. Eccles. tit. de Testamentis, c. 6.—(C.)*

(1) It may also be defeated by the legatee failing to comply with the condition of the bequest: as where it was given under an uncertainty whether the legatee was living, and it was required that he should personally claim it, and the legatee died abroad before so claimed. 1 Ves. & B. 248.—(E.)

De Testm. 252. *feit his legacy, saith Master Swinburne, unless the testator did will and appoint he should so do. The falling into enmity with the testator will be considered more fitly, as I take it, among the acts of the testator. In the next place, let us see what acts of God shall cause a legacy not to take effect (1). First, thus, if the legatee die before the testator, this legacy is lost, and his executor shall not have it (a). So also, saith Master*

(a) If a man devise lands to one and his heirs, and afterwards the devisee dieth before the devisor, the devise is void; for the will was alterable at the pleasure of the devisor, and the heir cannot be a purchaser. 1 Rep. 156, *Rector of Clodington's Case*.

Lands devised to two sons and their heirs, one dies in the life of the devisor. The devisor dies without new publication, the survivor shall have all: if both had died, then the heirs could not have taken. *Calthrop*, 3, 4, 5, *Davies v. Kemp*, Mich. 16 Car. 2.

If the testator give to *A. B.* twenty pounds if he will; in such case *A. B.* must express his willingness to accept thereof by some means, or else the legacy is not due (2); and

(1) A legacy may also be defeated by the incapacity of the legatee; for though in general all persons are capable of taking, yet there are some exceptions by common law and by statute. 4 Bac. Abr. 337; 4 Burn. Eccl. L. 313; 2 Bl. Com. 512: thus traitors, *ibid*: persons refusing to qualify for offices, by 25 C.2, c. 2; 1 G. 1, 2, c. 13: persons guilty of a second offence against the Trinity, 9 & 10 W. 3. c. 32: artificers quitting the realm, 5 G. 3, c. 27. Witnesses to wills are now also disqualified from taking a legacy under the same will, whether of real or personal estate; 25 G. 2, c. 6; but this extends not to wills disposing only of personalty. 17 Ves. jun. 508.—(E.)

(2) How far it is necessary for a party refusing a bequest
of

Swinburne, if it be appointed to be paid after the death of the executor, and the legatee dieth before the executor, it is lost. And so also if he die before the condition performed, saith he. Let us come now to time of payment, and death before it. If there be a day certain limited for payment, and the legatee die before that day, his executor shall have the legacy; contrariwise, if the payment were limited to be made when the legatee should be married: but if it were only expressed to be towards the marriage of the legatee, and she die before marriage, her executor shall have it, saith Swinburne. Now put the case that a legacy is bequeathed to *B.*, to be paid when he shall be five-and-twenty years old, and *B.* dieth before that age; it shall now be paid to the executor, and that presently, without staying till *B.* should have been of that age, saith Prierius. Nay, saith Swinburne, if the words of the will

De Testm. 255.

Vide Bro. Devise, 27 and 46. There were divers days of payment, and the devisee die before the last, his executor shall have it, 14 vel. 24 H. 8, 36 H. 8, & 3 El. D. 59. See this difference. Sum. Sylv. 283. According hereto vide Dy. ubi supra per majorem opinionem justiciar. The executor shall not have it till *B.* would have been 25. 2 Vern. 109. Trin. 1728, Laundry & Willie, but if payable with interest, qu.

Stapleton v. Cheals, Rep. of Cases in Eq. 76, by C. Baron Gilbert, Hil. 8, Ann. in Cauc.

if he die before such expression, then the legacy is lost, and shall not go to his executors or administrators, which otherwise it would, if no such condition had been expressed. P. Swinb. p. 4, s. 6, n. 7.

That requesting and accepting a thing imply an assent, *non enim refert an quis assensum suum præbet verbis an rebus ipsis et factis.* 10 Rep. 53, *Lampet's Case.*—(C.)

of lands to disclaim by deed or matter of record, seems doubtful: on the one hand, the will operating as a conveyance of the legal estate; and on the other, it being inconsistent with the nature of a freehold that it should be cast upon a party against his own consent. See *Townson v. Tickell*, 3 B. & Ald. 31; and *Doe d. Smyth v. Smyth*, 6 B. & Cr. 112.—(E).

Acts of the testator.

Sam. Sylv. 285.

be so, viz. when he shall come to such an age, then if he die before, his executors shall not have it at all; but if the bequest be general, and further it be added in the will, that the testator would have that legacy paid to the legatee at such an age, there, though he die before such an age, yet his executors shall have the sum bequeathed. The difference may be seen very nice, yet haply it wants not some probable colour of reason. Now, lastly, let us come to the testator's own acts, who clearly hath power to revoke or countermand any legacy, though he revoke not the rest of the will (a). And here first of revocation presumed. If there fall out *graves inimicitias inter legantem et legatarium, legatum caducum efficitur*, saith the summist; *sed non propter leves*, saith he, *et si graves, si tamen redeant ad amicitiam, redintegratur legatum*. That is, by grievous enmity after arising, and never reconciled between the testator and legatee, the legacy is dissolved; otherwise of a light breach or falling out, though it continue until the death of the testator. This I conceive to be rather fit for this place, as an act of the testator, than to be reckoned or registered amongst the acts or forfeitures of the legatee; for that it is not by the summist made material, or

(a) A man made a feoffment to perform his last will, and his will was annexed to the charter of feoffment, and livery of seisin thereupon made accordingly: it was adjudged that he might alter and revoke this will, although it took effect by the livery. Dyer, 49, pl. 12.—(C.)

any point of difference, whether the legatee gave just cause of offence, or that the testator unjustly conceived displeasure, and so grew into causeless enmity. Therefore also do I hold it of the nature of a revocation implied or presumed; for that, although no revocation be made, yet since the testator hath ceased to bear good will to the legatee, he cannot be intended to will him good, nor consequently to be of the same mind touching the benefiting of him, as he was when he made his will. Yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case, thus; that where the testator dieth shortly after the breach and enmity grown, and before he come to the place where his will is, or at least to opportunity of perusing and reforming the same, there this very alteration of affection should make an alteration in the will, and a revocation of the amicable bequest. But where he, living a good space after, and coming to the place where his will was, and especially if he do again peruse it, he yet doth not cross nor expunge that bequest, here it may be presumed that either his enmity ceased, or that so far as to continue this bequest, the charity or other motives inducing him to make it stand unvanishing and not extinguished by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or nuncupative will, without reducing it to writing, and causing it to be attested by witnesses, though the testator live divers years after, doth stronger

argue his intent not to continue, that what was done in an extremity should stand as his will: so, on the contrary, the permitting of a bequest expressed in a written will to continue without any crossing, blotting or defacing, may argue, against contrary presumption, the testator's mind, that it should continue as part of his will. But now let us consider of more express revocation; and to that purpose will relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three judges, and two doctors, masters of the court, between *Robert Eyre* and *William Eyre*, complainants, and *Hester*, late wife of *Christopher Eyre*, their brother, and now wife of *Sir Francis Wortley*, defendant: thus was the case. The said Christopher Eyre, 15 Jacobi, by his last will and testament giveth and bequeatheth to the said Robert Eyre his brother an hundred pounds, and to the said William his brother a thousand pounds, and gives to the said Hester his wife all the residue of his estate, and makes and ordains the said Hester his sole and only executrix, saving, for the performance of his will, he orders Robert Eyre and William Eyre, his said brothers, and entreats them to join as executors in trust with his wife, for the better performance of this his last will. Afterwards, Jan. 5, 1624, being sick of the sickness whereof he died, he was moved by Master Dampont and Master Stone to settle his estate: to which motion he yielded: and Master Stone and Master Dampont did demand of the said

Christopher what friend he thought fittest to be his executor, and to whom he would commit the care of discharging his funeral, and performing his will, whether he trusted any person more than his wife to be his executor. To whom he answered, that his wife was the fittest person for that purpose, and therefore should be his sole executrix. And then the testator was moved by Master Stone to give and bequeath legacies to his father, to his brethren, and to his kindred: whereupon he answered, he would give or leave them nothing. And being further put in mind to remember his friends and others, gave and bequeathed to Lionel Atwood, his god-child, twenty or thirty shillings. And being thereupon moved by his wife to give his said god-son more, or a greater legacy, or the like in effect, he said, thou knowest not what thou doest, do not wrong thyself; twenty shillings or thirty shillings is money in a poor body's purse, or the like in effect: and the rest he left to his wife's discretion or disposition. And the said testator did speak the words aforesaid, or the like in effect, *animo testandi et ultimam voluntatem declarandi*, as the witnesses then present did conceive.

This will was proved by the oath of the said Hester, and this codicil pleaded as a revocation of the said bequest, the said Master of the Rolls, judges and doctors, were by the Lord Keeper and the order of the court, desired to reduce the matter upon the will and codicil into a case, and to certify their opinions, whether the said

Ord. 27 Jan. a.
2 Caroli Regis.

codicil were a revocation of the legacies given to the plaintiffs, or not. And they, after council heard at several times, viz. both common lawyers and civilians, and many hours spent in conference together, did finally resolve, with one unanimous consent, that the legacies to the plaintiffs given were not by the said codicil revoked, and so certified under their hands. Upon reading whereof November 25, decree being resolved to be made, if cause were not shown to the contrary November 27; on which day the defendant's council, before the Lord Keeper, in the presence of the Master of the Rolls and the said three Judges, and Sir John Heyward, alleging what they could in stay of the said decree; it was by a general concurrence of opinion decreed, that the legacies given to the said plaintiffs should be to them paid on our Lady-even, with twenty nobles in the hundred for the detainment thereof.

This case I thought fit to relate somewhat at large, because it pitched upon the point of revocation, without plain, full and express terms. And surely, as wills are to be made out of disposing memories and understandings, so also with deliberate and advised judgments; and therefore by like reason not to be countermanded or revoked by sick or slight expressions. And this seems to me very agreeable with the rule and reason of the common law. For as reason itself doth dictate, that *nihil tam consentaneum est æquitati naturæ, quam unumquodque dissolvi eodem modo quo constituitur*; so hath the common law of England, in

my understanding, resolved; as, for the purpose, if the King present a clerk to a church, and he is thereupon admitted and instituted thereunto; now yet before induction may this be revoked, as a will may: yet if the King shall after, and before induction, present another man to this church, without an express repeal or countermand of the former presentation, it shall not thereby be revoked.

So if lands were conveyed to certain uses, with a clause or power of revocation, the sale of the same to another did not revoke the former: but if an estate were merely at will, then the conveyance to another by the common law amounted to a revocation (a). Therefore was the statute made

To help this was
the stat. made,
27 El. cap. 4.

6 H. 8, cap. 9.

(a) A man deviseth Blackacre to A. in fee, and after, by the same will, devised a third part to B. for life, or in tail: this last devise to B. doth not make void all to A.; but B. shall have an estate in possession, A. in remainder. Calthrop, 174.

If a man make a will and devise of his lands, and after disagreeing to it, he makes a feoffment, and taketh back an estate in fee, and dieth; this land shall descend to the heir, and shall not pass to the devisee without express agreement that his mind was that his former will should take place. Lib. Ass. 44; Dyer, 143, pl. 55; 44 Ed. 3, 33; 2 R. 3, 3; and vid. 1 Vern. 330; 2 Vern. 209, *Cotton v. Cotton*.

In ejectment upon *non cul.* and special verdict, tenant in tail made his will and devised his land, and after, by bargain and sale enrolled, conveyed the land to one tenant to the *precipe*, against whom a common recovery is had, with voucher of the tenant in tail, to the use of himself in fee; and if by this recovery the will was made good, and that the devisee shall have the land by the devise by virtue of it, or that it shall revoke the will, was the question. And by

tempore Henrici 8, to redress this, *viz.* that where the King had granted lands or other things to one during his pleasure, this should not be revoked by a grant to another, without recital of the former, and declaration that the King had determined his pleasure.

Being now to consider of relation in the executors assent, it is meet, since these discourses are principally intended for those who are not grounded students in or professors of the law, that we show what we mean by relation, or what it is in law. Thus therefore be it conceived, that relation is a kind of fiction in law, making a thing done at one time to be accepted and reputed, or to have its operation, as if it had been done at another time past. As, for the purpose, *A.* doth bargain, and sell freehold land to *B.* in August, by indenture, which is not enrolled till October following; yet this hath such relation to the date of the indenture, that if *A.* after that, and before the enrolment, become bound in a statute, or granted a rent-charge, or made a lease for years, or took a wife, or committed felony, yet shall none of these be of any force to charge or prejudice the state of *B.*, for that the law adjudgeth him

Pemberton, chief justice, and *tout le court*, it was adjudged upon argument a revocation; for by the bargain and sale, and the recovery, all the estate is altered after the will. Levinz, 3, part 108, *Dister v. Dister*.

A conveyance for years is not a revocation of a devise in fee, but *pro tanto* only. Ca. in Chanc. 193, *Barber v. Took*.—(C.)

now owner by relation as from the time of the date: yea, if a servant departed in August for some great breach with his master, do kill his master in October, this is in law petty treason; as if he had continued servant when he did the fact; because it relates to the malice conceived when he was his servant. Now having showed that a term or other chattel real or personal passeth not, nor is transferred in property to the devisee, until the assent of the executor be thereunto had; we now put the case that this assent is not had till a year, or some such good space after the testator's death, and make our question, whether this shall have relation to the testator's death, *viz.* to be in the law's account as if it had then been; or, perhaps, to some purposes so to stand, and to others not so? That this is useful and material to be known, be it thus showed. One bequeathed his term of tithes of an advowson of a house or land by him first leased to an under-tenant for rent, and dieth in May, the executor assenteth to the bequest in October, between which two times tithes be set out, the church becometh void, rent groweth payable; now if this assent shall relate to the testator's death, the devisee shall have these, else not. The like cases may be put of the brood of cows, mares and ewes, fallen between the death of the testator and the assent; so also of fleeces of sheep shorn, &c.

Now to come to the point, it is reported by the Lord Coke to have been held in the late Queen's time, that this assent shall, as between

Tr. 41 Eliz. Co.
lib. 5, f. 12. B.
Sander's case.
Vide Plow.
Comm. of tres.

pass against
a stranger for
taking before
assent, 320, b.

the executor and the legatee, have relation to the testator's death, yet so that if the executor before his assent to the devise of the lease committed waste, now the action of waste shall be brought against the executor in the *tenet* for the waste done before, and not against the devise in the tenet.

But put the case that the legatee before the executors assent granted the term to J. Sr.; now if to any purpose this assent shall have relation; it shall certainly so be, to make good this grant as making the legatee to be estated, and consequently able to grant before the executor's assent; yet do I not find any opinion or resolution in the point, but find it debated at the bar in the late Queen's time, between Puckering and Egerton in the case of administration granted to A. after her grant of a free term left by her intestate husband; but I find no resolution therein, nor perhaps wants there material difference betwixt that case and the other; for there the devisee had at least an inception of title by gift of the owner, wanting only a circumstance of assent to perfect it; but here this woman till administration had not so, unless perhaps she statute 21 of King Henry the Eighth, directing or enjoining ordinaries to grant administration, shall amount to a kind of title *ad rem*, though not yet *in re*. But to return to the point of assets; where a reversion is granted by deed or fine, if the lessee a good time after do attorn, this shall have no relation to the time of the grant; so as for waste

P. 25 Eliz.

committed or rent grown due between the grant and attornment, the grantee can have no remedy. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the assent of the executor before the sale or gift well testified; or if the assent be not had till after, let him take a new gift, that he may not rest in a doubtful case: for besides the premises, that great legist Sir Edward Coke, when he was a practiser (to Mr. Stubbs of Norfolk) for his fee, gave his opinion, as I have been confidently informed, that where a lessee for years, being outlawed, did grant his term, and after reversed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant (a). And this hath much affinity with the principal point; for there, if the relation help not, the grant is not good from the legatee.

Divers cases of Bequests considered and expounded (1).

If a termor of a house bequeath his house to
B. without expressing how long he should have

14 El.Dy. 307.
 Cont. in a grant
 31 Eliz.

(a) A devise of lands to a man during his exile, he having relinquished his country upon displeasure of the states against him, but not banished, was good till he return. 2 Lev. 191, *Paget v. Voscius*.—(C.)

(1) Legacies are either general or specific, and of these latter there are, first, such as are particularly described, and which

it, he shall have the whole term, and number of years (a). So of land (b).

(a) If the testator bequeath to a child in the mother's womb one hundred pounds, in this case, if the mother bring forth two or three children at that time, the legacy is to be divided amongst them. P. Swinb. p. 4, s. 20.

But if the testator say, if my wife bring forth any child, I give to the same one hundred pounds; here, if she bring forth two or three children at that time, then every child shall have one hundred pounds, if the testator's goods suffice to satisfy the same; unless it be sufficiently proved that it was the testator's meaning that they should have no more but one hundred pounds among them. *Ib.*—(C.)

(b) Lands contracted for by a purchaser pass by a devise of the purchaser. Ca. in Chan. 39; and 2 Chan. Ca. 144; 3 Salk. 85.

A termor of a house for forty years devised the same by his testament, without limitation of the estate which he gave;

which can only be satisfied by delivery of the very subject, and if not found among the testator's property fail altogether; and secondly, such as describe a chattel of a particular species only, and may be satisfied by delivery of any one of the same kind. Bac. Abr. 337. 355. 425; 2 Bro. Ch. R. 113. If the bequest be of a sum of money for a ring, it is of the former description, a general pecuniary legacy. 1 Ves. & B. 364.

A legacy is sufficiently certain if the party can be identified, even though the testator mistake his Christian name. Coop. R. 229; 1 Mer. R. 384. It may be shown by parol evidence, that under a gift to children, natural children were meant, as where the testator was unmarried. 2 Mer. R. 419; 1 Madd. R. 430. So great-grand-children under the term grand-children, unless the intention appear otherwise. 1 Eden. R. 194.—(E.)

10. Also by the name of the house, the orchards, gardens and backsides do pass: yea, if the house

Gulliver v.
Poyntz. Mich.
11 G. 3, C. B.
3 Wilson.

it shall pass the whole term, for the devisee may not have an estate in the messuage at will, nor for term of life, nor any term for years or a year. Therefore the entire term shall pass *per opinionem Justiciariorum de Banco*, Dyer, 307, pl. 69.

In ejectment and special verdict, where a man seised of lands in Newcastle-upon-Tyne, where the lands are devisable by parol by the custom: by a parol will a devise was in these words: I give all to my mother, all to my mother; and if the lands should pass by these words, was the question. It was argued by Glyn, the King's serjeant, for the plaintiff, who said, that *all* was uncertain whether intended land or goods; and by Jones, for the defendant, who said, *qui omne dat nil excipit*, and cited a case where by the devise of all his estate, all the estate as well real as personal did pass; and Benlow, 6. Devise of all his livelihood extended to land and goods. But *per Cur.* *all* is uncertain, and not sufficient to disinherit a heir, and gave judgment for the defendant that the lands did not pass by the will. 1 Lev. 130, *Beman v. Milbank*.

A devise of the profits till a child come to twenty-one years of age, is a good devise of a term till the child would be twenty-one, though he died before. Ca. in Chan. 114, *Creditors of Church v. Church*; 3 Co. 20. b. *Boraston's Case*, St. R.

A man seised of lands in fee in one town, and in two hamlets of the same town, and by his last will devised all his lands being in the town, and in one of the two hamlets by name, and died. And the opinion of divers justices was, that nothing in the other hamlet should pass. Dyer, 261, pl. 27.

Brown contr.
because the will
comprehends
all the hamlets.

If the testator bequeath one hundred pounds to the church, not mentioning what church, it shall then be understood of his parish church; or if he name a church, and there be divers there of the same name, and none of them his parish church, then the executor, if he prove the will, or the ordi-

Sum. Sylv. 286.

with the appurtenances be bequeathed, thereby the land belonging to the house, or used with it, do pass, though yet they would not so do by such words, in any lease, deed, or grant. Yet by some civilians or canonists, the orchard belonging to an house shall not pass by the only gift of the house, without some words showing the intent of the testator so to be, or except one gate or door lead as well to the orchard as to the house: but some other of them hold, that it doth pass without any such help of circumstance, so as it be adjoining to the house.

Ibid. ut sup.

If a lessee for years give his term by his will to *A.* he shall have it without paying any rent, for the executors shall pay it for him, as I find in the Summist; but against reason, methinks.

If one bequeath his indenture of lease, his whole estate in that lease passeth. So if one bequeath his obligation or other specialty (*a*), the

nary if he refuseth, may bestow the same on which church he will; but if the testator's parish church be of the same name, it ought then to be bestowed there. Swinb. p. 7, s. 8.—(C.)

(*a*) If the testator do imagine himself to be indebted to another person, and doth bequeath that debt to the same person, which he erroneously supposeth he oweth him, not expressing any sum, in this case the legacy is void; but if he say, I do bequeath ten pounds to such a person which I owe him, whereas the testator knows he owes him nothing, yet in this case the legacy is due, notwithstanding the false demonstration; and here the testator is not presumed to err, unless the executor make proof of error. P. Swinb. p. 4, s. 2, 2. 14.

but or duty itself shall go to the legatee ; and by the canon or civil law the very action itself passeth, as I conceive, ability to sue the debtor in his own name : but in our law it is otherwise, the suit must be in the executor's name, for a debt or thing in action cannot be assigned, except by or to the King ; and only at the common law is the debt recoverable ; but the spiritual court may force the executor to sue, or let his name be used in the suit, for and by the legatee.

Sum. Sylv. 286,
ut sup.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corn, nor fruit growing on the ground, nor stone, nor timber prepared for building, as the canonists and civilians hold (a).

Yet 48 E. 3, 12, 13, it is admitted, that such a devisee of all goods, after debts paid, shall have a duty resting in account.

On the other side, if one bequeath the moiety of all his goods, the legatee shall have only the moiety of that which remains after debts paid ; for it only is to be accounted the testator's which he hath *ultra æs alienum* (b).

c) One deviseth to J. S. all his goods, chattels and household stuff, and there was 407 *l.* in ready money in the house, he had devised to A. 1,200 *l.* by the said will. The Court decreed, that as to the 407 *l.* though the words were general, considering the intention of the testator, who by his said will had given to her a legacy of 1,200 *l.* if he had intended to have given her 407 *l.* more, he might in the same place of the will have given her 1,600 *l.* And decreed, that the 407 *l.* should come into account of the personal estate. Chanc. Rep.

d) It was agreed for law, that if a man hath goods to the value of 100 *l.* and is indebted 20 *l.* and he devised to his heirs the moiety of all his goods, to be equally divided betwixt

Quæ. 36 H. 8.
Dy 59. Sum.
Sylv. 216.

By a bequest of all utensils or household stuff, plate nor jewels are not given.

If one bequeath to his wife all her apparel, she shall not have, as some civilians say, her ornaments of gold or silver ; by which is meant, as I take it, chains, jewels, bracelets, rings, &c. But others are of contrary opinion, except they be such things as are not lawful for her to wear.

Ibid.

If a bed be given by a will, *venit ornamentum ejus*, saith the civilian, that is, the furniture thereof passeth, *viz.* not only the bed, bedstead, bed-clothes, but also the curtains and valance, as I take it. But I think that by gift of a coach by will, the coach-horses pass not ; yet perhaps the furniture of the coach-horses may pass as appurtenant to the coach : for so I think they shall do, rather than by bequest of the coach-horses without the coach (a).

Ibid.

If one bequeath to A. meat, drink, and clothing, or *alimenta*, he shall have, saith the civil law, also lodging, habitation, and all things necessary for

her and his executors, and the executors pay the debt, the wife shall have the moiety of all the goods ; that is to say, to the value of 50 l. without any defalcation for the debt, so as the executors have assets : but satisfaction or sale of any parcel of the goods by the executors is good enough, and shall take away the division of the wife in that parcel. Dyer, 164, pl. 57.

(a) If a man devise his silver tea-kettle and lamp, with the appurtenances, nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tongs, strainer or canisters. Eq. Cas. Abr. 201 ; Moseley, 47.—(C.)

the maintenance of life, viz. as I take it, fire and washing, &c.

If one bequeath to his daughter ten pounds a-year for her apparelling, and she demandeth none in four years, now shall she not after that time have the arrearages of this ten pounds by year for the time passed. Sum. Sylv. 216.
b.

If a man bequeath one of his horses or cows, not naming which. to *J. S.* he is to choose which he will, so it be not the best of all, saith the civil law: and perhaps the mention of that exception grows, out of respect to the heriot, which the lord should have, or the mortuary, which the parson should have.

A man bequeathed thirty pieces of twenty hillings to *A.* twenty to *B.* and ten to *C.* to be laid in such a chest or casket, and it is found after his death that there be but thirty in all in that casket or box; now each shall be abated rateably, with my summist, so as *A.* shall have fifteen, *B.* ten, and *C.* five; and this stands with good reason and justice; for so each hath a proportionable part (*a*). And it was reasonable that it were by Parliament established for law, that all, both legatees and creditors, should be paid in like proportion, where the state will not suffice for full payment of each, Ibid.

(*a*) Where the testator doth bequeath ten pounds to *A. B.* remaining in such a chest, and at his death only five pounds found in the same chest; in this case the legacy is good for only the five pounds found in the chest, and no more. Swinb. l. 7, s. 15, n. 15.—(C.)

rather than that an executor should have power to pay one all, and another nothing (1): yet if the testator left sufficient to make good all those sixty pieces bequeathed, *quære*, if that which is wanting in the casket shall not be supplied and made up; for if the cases following found with the same author be good law, it should seem so to be (b).

(a) Several legacies are given; the first is due, the other is not due till afterwards: the executor may not pay the first whole legacy to the first, if there be not assets to pay the rest.

In *Grove and Benson's Case* legatees were decreed to abate in proportion, where there was not enough to pay all debts, though one of the legatees have a statute and a mortgage for his security of the legacy, and his legacy continued no longer a legacy; yet his legacy not being paid, he was decreed to abate in proportion. 21 Car. 2.

If a man bequeath twenty pounds to A. and twenty pounds to B. and twenty pounds to C., and makes his executor, and dies, having goods but to the value of twenty pounds in all, of which goods the executor makes an inventory; in this case he may pay which of the three he pleases his whole legacy, and the other two are without remedy; or he may, if he please, pay every one of them a rateable part; and if in case the executor make no inventory, yet he is chargeable no farther than the value of the goods; and so if every legatary in such case should sue him, they must prove sufficiency of goods, or otherwise they should get nothing. Dr. & Stud. l. 2, c. 10.--(C.)

(1) The courts are therefore in general averse from construing legacies to be specific, as separating them from the general property; Ambl. 310; unless there be a clear intention so to do, in which case they will be carried into effect.

1 Atk.

If one, saith he, bequeath to *J. S.* that which is another man's, and whereto the testator hath no right; then ought his executor to buy it, and give it to the legatee, or else satisfy him to the full value; and this, not only by the civil, but also by the canon law, and in *foro conscientiae*, saith my author (1). Sum. Sylv. 286.

Again, if *A.* bequeath to *B.* such a horse by name, and after sell away that horse, and dieth; now is his executor bound to answer the value thereof to *B.*; and if the testator, after his sale of that horse, had bought another and called him by the same name as the first, now shall this latter horse pass to *B.* saith the book, except it can be proved that the testator sold the former horse of purpose to revoke his will touching the bequest (a). Ib. 216.

So again I find, that if one having but a moiety or one half of a green close, or of a stack of corn,

(a) If the testator bequeath two horses to two men, having no more, and one of them is a great deal better than the other; in this case, he that is first named in the testament shall have the election.—(C.)

1 Atk. 508; 3 Atk. 103; 1 P. Wms. 403. 540. 598; 3 P. Wms. 384; 2 Bro. Ch. R. 108. 125; 3 Id. 160; Prec. Ch. 392; 1 Ves. 425; 2 Id. 563; 15 Ves. jun. 384; 2 Fonbl. 374, n. o.; 2 Vern. 688.—(E.)

(1) And where the gift is of a specific chattel, which after the testator's death is found to be in pawn, the executor must redeem it. 4 Bac. Abr. 355; Swinb. p. 7, s. 20; 2 Bro. Ch. R. 113.—(E.)

or other chattel, doth give the whole, so as the words be apparent to reach to more than his moiety, then must the executors buy out the other's part for the legatee, or give him the value; but if the words be but general, so as they may be reasonably satisfied with the testator's part, no supply shall be made. So also if one, having goods in pledge, bequeath them, it shall be construed to extend no further than his right.

Sum. Sylv. 284,
2.

A bequest is made of an hundred pounds to be paid at a future time, viz. divers years after the testator's death; a question is made by the summist, whether the profit of the money in the mean time shall go to the legatee, or the executor: and he resolves with this difference, if the day were given in favour of the legatee being an infant who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were in favour of the executor, then shall the legatee have but the bare sum, without any addition of mean profits (a).

(a) Legacy of 125 l. was given to the plaintiff to be paid at ten years of age, and at that age it was paid to the father, who after died insolvent; the infant at full age sued the executors of the deviser for the 125 l. The lord keeper held it good payment. But it appeared that the executor took bond to save him harmless, and then he took the security at his own peril, and therefore decreed the executor to pay it. *Halloway's Case*, 26 & 27 Car. 2; and *Halloway and Collins*, 1 Chan. Ca. 245. But since that case the matter is well settled, and payment to parents disallowed, as in the case of *Doyley and Tolferry*, 1715. Mich. Eq. Abr. 300, pl. 2, 58, pl. 6; Vern. 261; Gilb. Eq. Rep. 103; Will. Rep. 285; Gilb. Chancery, 331.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequest (a); because it is no more than the law would say, if he had said nothing (1). So if it be generally to perform his will.

15 El. Dy. 331.
Plow. Com.
545, b.
Co. lib. 8, 96, 2.

(a) Lands devised for the payment of debts and legacies, the personal estate shall be first applied; for the implied intent must not, without clear expression, alter the equitable general law. Ca. in Ch. 297, *Lord Grey v. Lady Grey*.

Devise of the land after his debts paid, he afterwards contracts other debts; the land shall revert upon payment of the first debts. 3 Lev. 433, *Lodding v. Kime*.

Portions devised out of lands payable at prefixed days, which the premises will not do, amounts to a devise to sell. *Ib.* 129.

A devise that lands shall be sold, and not said by whom, shall be sold by the executors. The like intent when they are to be sold for payment of debts. 1 Lev. 304, *Pitts v. Pelham*.

A devise to an heir on condition to sell, void in law, yet good by way of trust in equity. Cases in Chan. 177. 179.

A man devised lands to his wife for her life, and that after her death the reversion should be sold, and the money distributed between the heir and three nephews; the heir refused to sell or to join with the wife in the same. And upon a bill exhibited in chancery against him to compel him to join in the same, the bill was dismissed by the lord keeper Bridgman, who held the will void as to the sale of the reversion, it not being said who should sell; but, in the House of Peers, they, upon advice with the judges, reversed the dismissal, and decreed that the heir should sell; for when no person is appointed to sell, it shall be intended that he shall sell who hath the estate, that is the heir. Vide 5 H. 7; 12 B. per Hide, *Fenwick and Finneaux*.

(1) And such a devise in trust will not operate to revive a debt which has been once barred by the Statute of Limitations before the testator's death. 2 Ves. & B. 275; *contra*, 2 P. Wms. 373.

If one, seised in fee-simple of land, bequeath it to his executor to pay debts, the executor hath no estate of freehold: for if he should, then it must be either for life, which might end by his quick death before debts paid; or in fee-simple, which would carry away the land for ever from the heir, where perhaps a few years profit might suffice to satisfy the debts; yea then by death of the executor the land should descend to his heir, and not go to his executor, who would be executor of the first testator (a).

By deed or word in life, 4 E. 6. Bro. Done, &c. 43. Tr. 37 El. in B. R. Portman v. Simmes or Willis, divers times argued.

If one give or grant all his goods, having leases for years as well as moveables, the leases shall not pass, as was held in the time of King Edward the Sixth. And so also was it admitted in *Portman's Case*. For the word *bona* comprehendeth

(a) If a man by testament devise that his executors may sell the tenements he hath in fee-simple, after his death the executors may sell the tenements, and put out the heir; but in this case they must all join. But if a man devise lands to his executors to be sold, and one of the executors dieth, the survivor may sell the land, because as the estate so the trust shall survive. And what might be done by custom in some particular places, when Littleton wrote, may now be done generally by stat. 32 & 34 H. 8. And if one executor refuse to sell, the others may sell, but not to him that refuseth. 1 Inst. 113.

And it is better to give them an authority than an estate, unless the testator intend they shall have the meane profits till sale. Co. 1 Inst. 112. 236.

And here you may note a diversity between a devise which may create or pass an estate, that cannot by conveyance or act executed in life of devisor. *Ibid* 42.—(C.)

only moveables, by the better opinion there. But the point in that case was pertinent to this place, viz. a bequest in a will of all the testator's goods: and whether thereby a lease for years passeth or not, was divers times debated, but not resolved, the judges differing in opinion in that point(a); but in another point, which made an end of the case, all agreed. Yet the better opinion was, as I find in my report, that a lease would pass by such words in a will, though not in a deed or grant by word otherwise made; for the legacies are demandable in the spiritual court, where *bona et catalla* are taken for all one. See also the statute of Marl. giving an action to the successor. *Ad repetenda bona prædecess.* Yet an *eject. custod.* hath been maintained thereupon. So also upon the statute of Executors, *De bonis asportatis in vita testatoris*, hath it been resolved, and where administration is granted, it is only *omnium bonorum*, without speaking of chattels; yet hath the administrator interest in leases as well as moveables.

Cap. 28.

4 E. 3, c. 7.
So the stat. 5 R.
2, of forfeiture
of goods by
those who go be-
yond the sea,
cap. 16. In all
these goods are
comprehended.
13 H. 7, Kelw.
Rep. 33, a.

(a) The will was good if executed, but could not compel an execution at law; therefore equity ought. And as to the pretence, that there was no person named in the will to sell, Serjeant Maynard said, that when the intention is clear, all means without which that cannot be attained must be supplied by a court of justice, and divers precedents were cited; as *Hughs* and others v. *Collins*, *Lockton* v. *Lockton* and others. Where lands were decreed to be sold, sometimes by the heir, sometimes by the executors, according to the intent of the party appearing, although no person appointed to sell. Ca. in Ch. 177.—(C.)

On the other side, the statute *de Prerog. reg.* mentioning only forfeiture *de catallis*, is clearly extended to moveables: so also in the writ of assize *de catallis quæ in eo capta fuerint*, and in the writ of execution upon a statute there is only the *catalla*, and not *bona*: and in the case reported by Keilwey, *temp.* Hen. 7, it seems *bona et catalla* were taken for *synonyma*, or all one. It doth not appear that these statutes and writs were alleged or considered of, *temp.* Edw. 6, but in *Portman's Case* the most of them were.

If one will that his wife, or any other, shall have, or hold, or enjoy the moiety of his lease with his executor, this implieth not that the executor have the other moiety as a legacy also, but otherwise as the law casts it upon him; no more than where the moiety of fee-simple land is devised to the younger son, this shall not make the elder son to have the other moiety otherwise than by descent, as between *Low* and *Carter* was conceived. But there being a proviso in the wife's bequest, that if she married from the house, then, &c. Popham, Ch. J. held, that if she married at all, this was a marrying from the house; for she was no longer widow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.

Low and Carter's Case, Tr.
37 El. in Ban.
Reg.

CHAP. XX.

OF THE EXECUTOR OF AN EXECUTOR.

I SHOULD be taxed of omission, if I should not show whether the things forespoken of executors immediate extend also to the mediate or more remote executors. Assuredly, were I not by the books otherwise informed, I should think it somewhat strange, that the mediate executor in the fourth, fifth, or farther degree, should not, by the rules of the common law, stand in like plight executor to the first testator, as the first and immediate executor ; as well as the heir and assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate heir and assignee. And, indeed, we find both in the time of Edward the Second and Edward the Third, execution sued out upon a judgment and statute by an executor of an executor ; and why he might not as well maintain an action of debt, &c. I see not. But I must confess, I find both books to the contrary before any statute made in the point, and after an Act of Parliament to enable them to bring actions, and to make them subject to actions ; yet the statute speaks nothing of conferring upon them the testator's goods. Now if they have title to them before that statute, it is strange if they should not be suable for debts.

See Plow. 184.
a. debt against
the executor of
an executor.

19 Ed. 2, & 14
Ed. 3, Fitz. Ex-
ecutor 87 &
103.

11 Ed. 5. & 13,
Ed. 3, Fitz. Ex.
78. 25 Ed. 3,
c. 5

19 H. 8, 9, 10.
 4 El. Dy. 201.
 22 H. 8, c. 37.
 See 32 H. 8, 28,
 Leases. And 32
 H. 8, cap. 33,
 Condition. And
 13 El. cap. 5, &
 27 El. cap. 4, of
 Fraudulent
 Conveyances.
 21 H. 8, cap. 15,
 for falsifying
 Recoveries. 39
 H. 6, 45. 7 E. 3,
 62.

But since that statute, and at this day, where by a will a special trust is recommended to an executor, as to sell land, &c. this not performed in his life-time shall not be performable by his executor: contrariwise of an interest, as to take the profits of lands for certain years towards payment of debts and legacies. And where the statute *temp.* Hen. 8, gives remedy to executors for recovery of rents of inheritance behind in the testator's life, I doubt not but executors of executors are within the equity, as well as within the statute 9 Edw. 3, cap. 3, that the executor who appears at the grand distress shall answer alone. Yet the statute West. 2, cap. 23, for executors, was not to extend to executors of executors. *Quod non est lex.* So as now in all cases, except of special trust or authority without the office of executorship, the executor of an executor, how far soever in degree remote, stands as to the points both of being, having and doing, in the same state and plight as the first and immediate executor⁽¹⁾.

The estate of the first testator is liable into whose hands soever it come. Ch. Rep. 257, 30 Car. 2, cap. 7, made perpetual by 4 & 5 W. & M. c. 24, sect. 12.

(1) And he may be named the direct representative of the first testator in all legal proceedings, and no new probate of the original will is requisite. 11 Vin. Abr. 68. 90; *Ib.* 107. 420; Plowd. 525; 1 Leon. 275; 1 Salk. 309; Shep. Touch. 464; 4 Burn. Eccl. L. 273.

CHAP. XXI.

TOUCHING ADMINISTRATORS.

OF these also, as standing in much affinity with executors, it may be by some expected that I should have treated. But first, my excuse is, that these of executors only having grown to so great a bulk above expectation, I was unwilling to enlarge it farther.

Secondly, that which in the points of having and doing is before set forth and showed touching executors, may be applied to and understood of administrators; though not what is spoken of being and unbeing, or revocation of executorships, and other circumstantial points.

Lastly, I may perhaps, if these find good acceptance, add ere long that which appertaineth to administrators distinguished from executors, or wherein they stand in different state (1).

(1) Vide Supp. infr. 466.

CHAP. XXII.

CONSIDERATIONS IN CONSCIENCE TOUCHING
PAYMENT OF DEBTS, LEGACIES, AND THE
PREFERRING OR RESPECT OF PERSONS.

TO the advertisement, what course executors are to hold in their payments, I thought good to add this *in foro conscientiæ* ; that when as it shall stand in the executor's will and election to pay whom he will, and as he will in respect of equality in the dignity and degree of the debts, all being for the purpose by the specialty, and none of record, and yet he hath not wherewith to pay or satisfy all, here he may have three ways or courses in his eye.

First, where there is equality in the honesty and conscience of the debts, there (except in the ability of the parties to bear loss the disproportion may otherwise occasion) methinks it should be most honest and just to pay every one proportionably, and to let the loss of every one be equal. And the justness of this is taught by the law, which gives the *audita querela* for equal contribution in bearing of loss by them who stand in equal degree : so of legacies.

The property and inability of some, and the plenty of others, may *in foro conscientiæ* justify the paying more to one, and suffering him to lose

less (if any thing) than another. For if the widow's mite was a greater gift, so a greater loss than more out of abundance. Where charity finds or may find place or nearness to place of giving, it may find greater motives of preserving from loss: so of legacies.

The nature of the debts, and so sometimes of legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate, and so to suffer one to lose more than another. One debt may perhaps be use for money, or at least money lent for use; another may be money freely lent; another debt for land of inheritance bought; another debt for a lease, chattels or moveables, come to the executor. The first merits the least respect, next the second, then the third, and the last the most. But where, without any of these motives, there is not equality held in the payment, *peccatur* (as I think) *in conscientiam*. But let every one stand or fall by or to his own, or to him who is greater than his conscience. This equality Saint Paul, in another case, recommends to the Corinthians. And Solomon, whilst no inequality appeared in the point of right, showed his disposition to have made an equal division of the child between the mothers, who were joint claimers and competitors for it.

2 Cor. 8, 14.

See more of conscience, Doct. and Stud.

THE END OF THE OFFICE OF EXECUTORS.

H H

OF ADMINISTRATORS (a).

Administrator,
what.

ADMINISTRATOR (b) is he to whom the ordinary commits the administration of the goods of a dead man, for default of an executor; and an action shall lie against him, and for him, as for an executor. And he shall be charged to the value of the goods of the dead man, and no further, unless it be by his own false plea, or by wasting the goods of the dead.

If the administrator die, his executors are not administrators, but it behoves the ordinary to commit a new administration. And if a stranger, that is not administrator or executor, take the goods of the dead, and administer of his own wrong, he shall be charged and sued as an executor in any action brought against him. *Terme del Ley, v. Adm.*

The ordinary shall have an action for goods taken out of his own possession which were the intestate's, but not those taken out of the possession

(a) Supplemental chapter added by H. Curzon.

(b) *Cæteris paribus* administration is always granted to the party having the greatest interest (2 Addams Eccl. R. 352); as residuary legatees in preference to mere legatees or annuitants (2 Phillim. Eccl. R. 316; 3 Addams Eccl. R. 27); and the Court prefers a sole to a joint administration. 1 *Id.* 123, and that, notwithstanding the 29 Car. 2, c. 3, s. 15; 1 Hagg. Eccl. R. 341.—(E.)

of the intestate in his lifetime ; but the administrator shall have such action for goods taken out of the possession of the intestate. F. N. B. 203. The process herein is attachment or *distringas*, and if the sheriff thereupon return *nihil*, then he shall have *ca. al. et plu. et exig.* and so proceed to outlawry against him. *Ib.*

Where administration is granted by the inferior liocesan, where there is *bona notabilia*, and after it is granted by the archbishop, or *e contra*, how they shall operate together. 8 Rep. 135, *Nedham's Case*.

Administrator *durante minore ætate*, if he waste goods, shall be punished as executor of his own wrong.

If administrator avers in his declaration administration granted to him at London, and the letters of administration bear date in another place and county, the plaint shall abate. Touchstone of Prec. 195.

An executor hath judgment to recover a debt due to the testator, and dieth intestate before execution, and the ordinary committeth the administration of the first testator to one, the administrator shall not sue execution upon that recovery ; because he deriveth his interest, and represents the person of the testator, and so before the recovery. 1 Rep. 96, *Shelly's Case*. *Vide* 17 Car. c. 8.

Letters of administration obtained by collusion are void, and shall not repeal a former administration. 3 Rep. 78.

If an administrator hath judgment and dieth,

his executors cannot sue execution of that judgment; for none shall have execution of that judgment but he who shall be subject to the payment of the debts of the first intestate, and that the said executors are not. And the administrator of an executor shall not have execution of a judgment given for the executors. 5 Rep. 9, *Brudenel's Case*.

If a man lease a house and land for years, with a stock of money, rendering rent, and the lessee covenanteth for himself, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term; yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators (a), but not his assigns. 5 Rep. 17, *Spencer's Case*.

And if a man release, and after take administration, it shall not bar him, for the right of the action was not in him at the time of the release; but if an executor release before probate, it shall bar him. 5 Rep. 28, *Middleton's Case*.

(a) By 17 Car. 2, c. 8, where any judgment after a verdict shall be had, by or in the name of any executor or administrator; in such case, an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment.

An administrator shall pay a debt due by bond before a statute defeasanced to perform covenants, which perhaps never were nor ever will be broken. 5 Rep. 28, *Harrison's Case*.

Administration *durante minore ætate* shall cease at seventeen years of age, and if such administration be committed, the executor being seventeen years of age, it is void. 5 Rep. 29, *Piggot's Case*.

Administrator *durante minore ætate* cannot sell any goods of the deceased, if it be not for necessity for payment of his debts, or *bona peritura*; for he hath his office of administration *pro bono et commodo* of the infant, and such administration doth cease at the age of seventeen years of the infant. And an infant executor cannot assent to a legacy, &c. before the age of seventeen years; and if the infant within age of seventeen years take husband, if the husband be of full age the administration shall cease.

If the metropolitan, pretending the party deceased had *bona notabilia* in divers dioceses, commit administration, it is not void, but voidable by sentence. But if an ordinary of a diocese commit administration of goods, when the party hath *bona notabilia* in divers dioceses, such administration is merely void, as well to the goods in his own diocese as all others. 5 Rep. 29, 30, *Prince's Case* (a).

(a) Where an intestate has *bona notabilia* in two dioceses within the same province, either diocesan may grant ad-

By the custom of London, an executor or administrator is bound to pay money due upon a contract of the intestate, as well as if it were by obligation. 5 Rep. 83, *Snelling's Case*.

Executors and administrators shall have actions of debt for all rents arrear in lifetime of the testator, and may also distrain for the same. See, 32 H. 8; Wing. Abr. Rents, 1, 2, 3.

When administration is committed generally, *ratione minoris ætatis*, without any restraint or limitation, there such leases made by him are good. And such administrator shall have action to recover debts and duties &c.; for the interest of actions is in him; and shall likewise be liable to actions. 6 Rep. 67, *Finch's Case*.

Probate of wills, and constituting administrators (a), originally did not belong to the ecclesiastical consueance, but were given to them of latter times, and therefore nothing but the probate, and granting administration, is given to them, or doth appertain to their jurisdiction; but the trial of them is not given to them, for that it is left to the

ministration; but when there are *bona notabilia* in dioceses in different provinces, the administrations are not void, but will operate on any debt which the debtor at the time of the intestate's death had in such diocese. *Stokes v. Bale*, 5 B. & C. 491.—(E.)

(a) Administrators *pendente lite*, are merely officers of the court, appointed for a special purpose, and hold the property only until the suit terminates, and are then bound to pay over all that has been received to the party declared by the Court to be entitled. 1 Haggard Eccl. R. 313.—(E.)

trial of the common law. And in 21 E. 4, 50, it is holden, that if letters of administration be denied, the issue shall be, that the ordinary did not commit administration by his letter, &c. For there it is said, that letters of administration may be forged. And forasmuch as it is to be tried by jury, and not by the certificate of the ordinary; nor it needeth not that the will or administration be showed, to enable the plaintiff to his action, proved or granted by the ordinary himself, as in case of excommungement, which is merely spiritual, and originally belonging to the jurisdiction of the ordinary. But if the testament be proved, or administration granted by the official or commissary, or in some cases by the archdeacon, or other inferior judges ecclesiastical, who have lawful authority, in such case it is sufficient in law: 9 Rep. 41, *Hensloe's Case*.

Where executors of executors, administrators, and the heir after the age of fourteen, shall have account. See 2 Inst. 404.

If the administrator give or sell the goods of the intestate, and after the administration is countermanded, and granted to another, yet the gift or sale is good, unless it be avoided for covin, by 13 El. And if the administrator doth waste the goods, and afterwards administration is granted to another, yet any creditor shall charge him in debt. And if he plead the administration committed to another, the other may reply, that before the second administration committed, he had

wasted the goods, &c. 6 Rep. 18, 19, *Pacham's Case*.

There is a great difference between an administration that was once lawful, and an administration that was never lawful. *Ib.* and *ib.*

There is a difference between a sentence declaratory, by which letters of administration are declared to be void; and a sentence of repeal, which allows them to be good till repealed. 8 Rep. 143, *Drurie's Case*.

Ecclesiastical courts, or other persons, to take but one shilling for the seal, writing or setting forth administration, to any seaman dying in pay of the navy, unless he hath goods of the value of 20*l.* upon pain to forfeit 10*l.* Stat. 9 & 10 W. 3, c. 41; Wash. Abr. Stores, 7(a).

A term granted to the use of a feme sole, she dies, her administrator, and not her husband, shall have it. 4 Inst. 87.

There be divers kinds of intestates: one that makes no will at all: another that maketh a will and executors, and they refuse; in this case he dieth *quasi intestatus*; and justly did the law in this case appoint the ordinary; for the law presumed that he who had the care of his soul in his lifetime, would, after his death, have care of his temporal goods, to see them well disposed of. 2 Inst. 397; 2 Bl. Com. 494.

Ordinarius in law, in the common sense; sig-

(a) Administration of such are now regulated by 55 Geo. 3, c. 60.—(E.)

nifieth a bishop; or he or they that have ordinary jurisdiction; and is derived *ab ordine*, to put him in mind of his duty and place.

If the ordinary take goods of the intestate and die, yet his executors and administrators shall be charged in an action of debt. *Vide* 2 Inst. 397, 398.

The probate of every bishop's testament, or granting administration of his goods, doth belong to the archbishop, although he hath no goods but within his own diocese. What fees for probate of testaments and administrations, *vide* 4 Inst. 335, *et* *supra*, 116.

Ordinary inferior grant of administration is void whilst the prerogative administration granted by the archbishop is in force; for the two administrations cannot stand together. 8 Rep. 135, *Nedham's Case*.

The ordinary hath not power to give authority to another to sell the deceased's goods, because he himself hath but an authority; and *bona deventient ad manus ordinarii disponenda*; that is, for the good of the deceased. *Ib.* 135, *b.*

There are three kinds of executors: the first appointed by law, and therefore called *lawful*, as the bishop or ordinary. The second appointed by the testator, and therefore called *testamentary*; and the third appointed by the bishop or ordinary, and is called *dativo*, as an administrator.

The ordinary shall not have action of trespass for carrying away goods before he hath actual possession of them (as executors or administrators may have), but before possession the ordinary may sue

for them in the Spiritual Court ; and the ordinary shall not have action of debt as ordinary. 8 Rep. *Nedham's Case*.

Where a man, as general receiver, retained one in the service of his master, taking for his salary 10*l. per annum* by deed ; in this case, although the master might wage his *ley*, yet the receiver who was made administrator was charged in debt for the salary, for that he was privy to the retaine r by his testimony by his bill. But otherwise it is where the thing remains always in the nature of an account, for which action lieth not against an administrator. 46 E. 3 ; 10, *a, b*.

An administrator *de bonis non* may sue out a *scire facias*, and take execution upon a judgment had in the name of an executor or administrator. Stat. 29 Car. 2, & 22 & 23 Car. 2, c. 10. *Vide* 17 Car. 2, c. 8 ; made perpetual by 1 Jac. 2, c. 17.

The custom of London, that a contract shall bind the administrator as well as an obligation, is good, although contrary to common law. 5 Rep. 83, *Snelling's Case*.

Where divers are made administrators, they have but one joint interest, and therefore one of them cannot discharge a debt by himself in prejudice of the others, as one executor may do, as is showed in the ninth chapter of *Hern* ; but in such case all the administrators must join. *Hern's Law Conv.* p. 88.

If administration be unduly granted by the ordinary of an inferior diocese, the party grieved

cannot have a prohibition at the common law, but he must appeal to the metropolitan or archbishop of the province, from thence to the court of delegates; for the stat. of 21 Henry 8, doth not say that the administration shall be committed to the next of blood, or else the administration to be void; but that it shall be granted on such a pain, and so it does not take away the cognizance of the case from the ecclesiastical judge. Meriton's Touchstone of Wills, 227, s. 361.

If one die intestate, and the ordinary grant administration to a stranger, and the next of kin sues a citation out of the spiritual court to have the administration revoked, and pending the suit the administrator sells the goods to defeat the next of kin, and then the letters of administration granted to the stranger are revoked, and made null by sentence; yet in this case the sale by the first administrator is good. But if the next of kin had appealed to have the administration revoked, and pending the appeal the first administrator sells his goods; then, in such case, the sale is void. And so note the difference between a suit by citation to revoke a former administration, and an appeal; for an appeal doth suspend the former sentence. 37 El. B. R. *Packman's Case*; 6 Li. f. 18, b.

If the ordinary, knowing that there is a testament, and an executor named therein, will notwithstanding grant administration of the deceased's goods, not having first called the executor before him to prove the will, or to refuse or accept the

executorship; then, in such case, when the executor shall prove the will, he may sue the administrator in an action of trespass, notwithstanding the administration granted by the ordinary. Swinb. p. 6, s. 2.

17 Car. 2, c. 8. If an executor in an action brought by him recovereth, and afterwards dieth intestate, and then administration of the goods of the first testator is committed to *J. S.*; in this case *J. S.* before the stat. 17 Car. 2, c. 8, could not sue out execution upon such recovery, but was to begin anew; because he comes in paramount to the executor, and claims immediately from the first testator. But see now the 17 Car. 2, c. 8, for avoiding of unnecessary suits and delays, which is made perpetual by 1 Jac. 2, c. 17; and see 5 Rep. 9, *Brudenel's Case*.

An administrator is not liable in an action of debt upon a contract of the intestate. Mich. 30, 31 El. B. R. *Hughson and Webb's Case*; Cro. El. 121.

But if the administrator after the intestate's death promise to pay such a debt, if there be a consideration to ground the action, it is binding (a). As thus: the husband was indebted to

(a) And now, by 9 Geo. 4, c. 14, where there are two or more joint executors or administrators of any contracting party, none such joint executor shall be deprived of the benefit of the Statute of Limitations, in respect of any written acknowledgment by any co-executor; but judgment may only be recovered against the party only so becoming

another man upon a contract for beer, and died intestate; the wife took administration, and afterwards assumed upon herself to the creditor, that if he would deliver her six barrels of beer, she would not only pay for them but her husband's debt also. In this case it was adjudged, that judgment should be entered *de bonis propriis* generally, for it became a charge by her own act; and by her promise as administratrix she hath made it her own debt. Trin. 37 El. B. R. in *Whceler* and *Collier's Case*; Cro. El. 406.

An administrator may bring an action of trespass or trover, and conversion for goods taken away before he obtained the administration; for the letters of administration shall relate to the time of the intestate's death, and not to the time of granting them. M. 1652, B. R. *Longe* and *Hebb's Case*.

Note, that the ordinary may call the administrator to account, but he cannot force him to make disposition of the surplusage of the intestate's goods after debts paid, by the true meaning of the 21 H. 8, c. 5. But what remains shall go to the administrator; and in case there be any more debts to pay, which as yet are not discovered, the administrator shall be compelled to answer of his own goods; and if the ordinary will meddle to cause a disposition to be made, a prohibition will be granted against him, if the administrator re-

chargeable by virtue of any new acknowledgment; and every such acknowledgment, in order to render a party chargeable, to be in writing. —(E.)

quest it. M. 6 Car. 1, B. R. *Levan's Case*; Cro. Jac. 301.

An administrator accounted before the ordinary, and proved payment by one witness; and because the ordinary would not allow of proof by one witness, but did excommunicate the party for want of proof, a prohibition was thereupon granted; and the book says there, that the jurisdiction of the spiritual court is not taken away by the prohibition, but their proceedings only. P. 2 Car. B. R. *Bellamy and Alden's Case*, Latche's Rep. f. 117.

Note, that a man may die partly testate, and partly intestate, by the laws of this realm; though it is contrary to the civil law; and this he may do not only in respect of time, but also in respect of goods and place; for if a man have goods in divers dioceses, he may make executors of his goods in one diocese, and die intestate as touching his goods in another diocese; or if a man make one executor particularly of a certain portion of his goods, the executor is only so far chargeable with the payment of the debts and legacies of the testator as the portion of the goods to him allotted do extend unto; and as touching the residue of the testator's goods, if there be not another executor appointed, then for such goods he is said to die intestate, and administration may be taken of them. Bro. Ex. pl. 2; Fitz. Abr. pl. 26, tit. Ex.; Plo. Co.; *Greysbrook and Fox's Case*, Swinb. p. 4, s. 18, n. 4.

Where an appeal is made, and the first administration is confirmed, then the use is to send

back the cause to the court from whence it came by appeal ; but when the first sentence is reversed, then the first court is ousted of its jurisdiction, and the court which reverses it shall commit the administration *de novo*. P. 1 Car. 1, B. R. *Reeve and Denny's Case*, Latch. 85 (a).

Appeals in cases of testamentary, matrimony, and tithes, must be sued from the archdeacon or official (if the matter be there commenced) to the bishop of the diocese, and from the bishop diocesan or his commissary, in such case (when the matter is there commenced) within fifteen days after sentence given to the archbishop of the province, and no farther, but there to be definitively adjudged. See Num. 378, 24 H. 8, c. 12 ; Wing. Abr. Stat. tit. Appeals to Rome, n. 5 ; Co. 4 Inst. f. 339. *Vide* 24 H. 8, c. 12.

When the cause is commenced before the archdeacon or commissary of the archbishop, the appeal may be made (within fifteen days after sentence given) to the Court of Audience of the said archbishop, and from thence within fifteen days after sentence there, to the archbishop himself, and no further. When the cause is commenced before the archbishop himself, it was to be determined there without further appeal, by the stat. 24 H. 8, c. 12 ; Wing. Abr. Stat. tit. Appeals to Rome, n. 6.

But see the stat. 25 H. 8, where it is added

(a) The Courts reluctantly revoke administrations, good as to the purposes for which originally granted, although under circumstances it may do so. 1 Hagg. 241. 341.

further, that appeals shall be from the archbishop's courts to the King in his Chancery, where a commission shall be awarded under the Great Seal to certain persons to be named by the King, for the determination of the appeals, and from thence no further; and these commissioners are called delegates, because they are delegated by the King's commission. 4 Inst. f. 339, 340; 25 H. 8, c. 10.

When the cause or suit concerns the King, the party grieved may, within fifteen days after sentence given, appeal from any of the said courts ecclesiastical to the higher convocation-house of that province, and no further; and there to be finally determined. 24 H. 8, c. 12; 4 Inst. f. 323, &c.

Appeals from places exempt, which were before to the See of Rome, shall be in the Chancery *at supra*, and not to the archbishop; and shall be determined by the delegates. 25 H. 8, c. 19; 4 Inst. 340.

But note, that there it is said in the case aforesaid, upon the stat. 24 & 25 H. 8, that the sentence should be definitive upon certain appeals there mentioned; yet notwithstanding, the King, as supreme head, upon complaint to him made, may grant a commission of review, for so the Pope used to do as supreme head: and the same power which the Pope had formerly, doth now of right belong to the Crown, and is annexed thereunto by the 26 H. 8, c. 1; and 1 El. c. 1. And so it was resolved, Tr. 39 El. B. R. where the case was, that sentence being in an ecclesias-

tical cause in the country, the party grieved appealed to the Archbishop, where the first sentence was affirmed; from thence he appealed to the delegates, before whom both the former sentences were repealed, and made void by definitive sentence; and thereupon the Queen, as supreme head, granted a commission of review *ad revocandum* the sentence of the delegates. 4 Inst. 341.

If the testator make *A. B.* executor after the expiration of five years after his death, or he doth make *A. B.* executor for and during five years after his death; this assignation is lawful, and the ordinary may commit the administration of the deceased's goods in the mean time to the next of kin; during which time the act of the administrator is good, and cannot be avoided by the executor afterwards; and the ordinary may also commit the administration of the deceased's goods unadministered by the executor after the expiration of the time of the executorship, where *A. B.* is appointed executor but for a time. Swinb. p. 4, s. 17.

One of the half-blood is in as equal degree of kindred to have the letters of administration committed to him, as one of the whole-blood is. Style's Rep. f. 74, 75, *Hill and Bride's Case*, f. 102.

If the ordinary take any reward or fee for preferring of any one person before another to the administration, it is bribery, and punishable with a fine and imprisonment at the King's

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rogative Courts of Canterbury 22 & 23 Car. 3,
c. 10.

pleasure, and frequently loss of his place. Co. 3 Inst. 148.

A trust for raising money for a feme sole, if she marry with the consent of the trustees: and if not, then to such persons as the trustees shall name; and for want of such nomination, then to themselves; decreed in Chancery, to enure to the administrator of the feme sole. Ca. in Ch. 58, *Fleming v. Walgrave*.

Whom the ordinary shall appoint administrators, who shall have the benefit and be accountable as executors, and take bond for performance, and order distribution. *Vide* 22 & 23 Car. 2, c. 10.

29 Car. 2, c. 3,
s. 25.

That act shall not extend to the estates of feme covert that die intestate, but that their husbands may have administration of their personal estates.

No administrator shall be cited to render an account of the personal estate of the intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate, as a creditor or next of kin. *Vide* 1 Jac. 2, c. 17, s. 6(a).

(a) The representatives of a deceased administrator are liable to be called upon for an inventory and account; and a party may do so without first taking a *de bonis grant*. 1 Addams Eccl. R. 144. So the executors of a deceased executor, though there be one surviving. 2 Addams Eccl. R. 234.—(E.)

If after the death of the father any of his children die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and their representatives, shall have equal share with her. *Vide* 1 Jac. 2, c. 17, s. 7.

No popish recusant convict shall be executor, administrator, or guardian, but the next of kin shall have it. Stat. 3 Jac. 1, c. 5; Wing. Abr. tit. Crown, 41.

If a man die intestate, and a stranger taketh the goods, the ordinary shall not have an action of trespass for taking them, unless he had taken them into his possession. But the executor or administrator, before seisure, may have an action of trespass.

The ordinary cannot have an action of debt, covenant, or any other action which belongeth to the intestate, but those to whom the ordinary commits administration may have all these actions, by 31 E. 3, c. 11; 2 Inst. 398.

If the ordinary take goods of the intestate out of his diocese, he shall not be charged as ordinary by the Act Westm. 2, c. 19, because he taketh them in his own wrong. 2 Inst. 398.

The ordinary hath like interest in goods and chattels of the intestate, as the administrator to whom administration is committed *durante minore etate executoris, ad opus, commodum et utilitatem ipsius executoris, et non aliter seu alio modo.*

By 22 & 23 Car. 2, all ordinaries, as well judges of the Prerogative Courts of Canterbury 2 Inst. 398.
22 & 23 Car. 3,
c. 10.

and York, as other ordinaries and ecclesiastical judges, having power to commit administration of goods of persons dying intestate, shall take sufficient bonds of the person or persons to whom administration is committed, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with condition, according to the form in the statute. And the ordinaries may call such administrator to account, and make just and equal distribution of what remaineth clear (after debts paid, funerals, and just expenses of every sort first allowed and deducted) among the wife and children, and children's children, if any be, or otherwise to the next of kindred in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and rules and limitations in the act set down; and to compel the administrators to observe and pay the same by due course of the ecclesiastical laws, saving to every one their right of appeal.

Provided, this Act shall not prejudice the customs in London, or province of York, or other places having particular received customs.

The surplusage of such estates to be distributed as followeth, *viz.* one third part to the wife of the intestate, and all the residue by equal portions amongst his children, or such persons as legally represent such children (if any be then dead) other than such child or children (not being heir at law) who shall have any estate by settlement of the

intestate, or be advanced by the intestate by portion or portions equal to the share shall be allotted to the others by such distribution, in which case the portion is to be made equal to the rest. But the heir at law shall have equal part, notwithstanding any land he shall have by descent, or otherwise.

If there be no children, nor legal representatives, then one moiety of the estate to the wife, the residue equally to every of the next of kindred in equal degree, and those who legally represent them.

No representatives to be admitted among collaterals, after brothers and sisters children ; if there be no wife, then all amongst the children ; and if no child, then to the next of kindred in equal degree, and such who legally represent them.

No distribution to be till a year after the death of the intestate, and such to whom any share shall be allotted shall give bond, with sufficient sureties in the said courts, that if any debts be afterwards discovered or made, then to refund proportionably towards payment of them.

In all cases where the ordinary hath used to grant administration *cum testamento annexo*, he may do so still, and the testator's will therein to be performed notwithstanding the Act.

This Act was afterwards continued. *Vide* 22 & 23 Car. 2 ; made perpetual by 1 Jac. 2, c. 17, s. 5.

The husband died intestate, his wife had the administration committed to her alone, and after

took another husband, and they recovered in debt as administrators, during which suit the son of the intestate, by covin between the debtor and him, obtained other letters of administration to the wife and himself jointly. No cause of revocation or adnullation of the former letters in certain are set forth in the second letters, and after judgment, the son by covin, to defeat the execution, released to the debtor all demands and executions, and afterwards the husband and wife see execution, and the debtor upon this release sued an *audita querela*, and had thereupon a *venire facias* against the baron and feme, directed to the sheriff of London, with a *supersedeas* in it to stay execution; and the sheriff returned *nihil habent*, and thereupon they appeared and pleaded the matter of covin aforesaid, and a revocation of the second letters of administration, by sentence exemplified under the seal of the ordinary pendant the *audita querela*, &c. and thereupon the parties demur; and all the Court were against the plaintiffs, and so adjudged, Mich. *prochaine sans aucun argument*. Dyer 339, pl. 46.

By 14 Geo. 2, c. 20, s. 9, distribution shall be made of *estates pur autre vie*, whereof there is no special occupant, and which are undevised.

One *Daniel*, late citizen and goldsmith of London, among divers goods and chattels which he had as well in Ireland as in England, had an obligation of 80 *l.* made in Ireland by one *Lucre*, a merchant of Waterford in Ireland. *Daniel* died intestate in England, and his son obtained letters

of administration from the Archbishop of Dublin, of all the goods and chattels of his father within that province, and afterwards he made a release of the said debt and action thereupon to the said *Lucre*. And afterwards the widow of *Daniel* obtained from the Archbishop of Canterbury other letters of administration of all the goods, chattels and credits within his province, and happened to get the obligation; and upon that, as administratrix, she sued *Lucre* in London, supposing the obligation to be made there; viz. *in paroch. Beatae Mariae de Arcubus, in warda de Cheape*; and this release was pleaded in bar, and the truth was, *ut dicitur*, that the obligation was made in London, and remained there ever after. And also the obligee died at Dunstable in Com. Bedford, and thereupon, notwithstanding the said administration and release in Ireland, the said *Lucre* the defendant ought to answer to the said action as above brought in London, *per op. Cur.* And issue was taken if the obligation was made and remained in London, at the time of the debt, or in Ireland; but the issue by the folly of the pleader was joined, if the obligation was made in London, viz. *in paroc. Beatae Mariae de Arcubus, in warda de Cheape*, and the truth was, that it was *in paroch. Sancti Fosteri, in warda de Farindon infra*, and not in *paroch. et warda praedict.*, and so found by the jury; *et ideo non habuit judicium*. Dyer 305, pl. 58, *qu.*

Where the executor dieth before the probate of the will, his executor ought not to take upon him

the execution of the first testament, but the administration of the goods of the first testator, with the testament annexed, is to be committed to the executor of the executor, if the residue of the goods of the first testator (the legacies being paid) were bequeathed by his last will to the first executor, or to such other person or persons to whom the said residue was bequeathed, or else to the next of blood to the first testator demanding the same; and this (*ex relatione Drury*) is the use and custom of the said court, and agreeable to law; to which the court gave credit. Dyer 373, pl. 8 (a).

(a) Before Jones and Dolbin, justices of the King's Bench, and others, commissioners delegate, the case was, Mary Shore made her testament, and of it named Eliz. Wheeler her executrix, and gave the residue of her goods to the disposal of her executrix, and Sir John Shore, her brother, and died. Dame Wheeler not having proved the testament made her own testament, and of it made Eliz. Tayler executrix; after the death of Dame Wheeler, administration of the goods of Mary Shore *cum testamento annexo* was committed to Sir John Shore, who by his testament made his wife his executrix, and died, and afterwards administration *de bonis non, &c.* of Mary Shore, was committed to the Lady Shore, wife and executrix of Sir John; and the said Eliz. Tayler, having prayed administration to be granted to her, it being denied, she appealed to the delegates; and at first it was agreed, that the bequest of the residue by the words aforesaid, was a bequest of the interest, and not an authority only. Secondly, That this interest was not a moiety of the residue, nor did grow by survivorship to Sir John Shore in the case of a legacy as it should in a gift of goods at the common law. Thirdly, It was resolved, that though administration might be granted

Although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator: the law is the same of administrators, but the heir shall not at any time be charged without express mention of the heir. *Dyer* 23, s. 142.

Administrator sells a term; some years after an executor appears, and made oath in the archbishop's court, that he never heard of the testator's will, and renounceth, and the sale of the term was adjudged void; for the granting of administration by the ordinary is void where there is an executor named. But this may be inconvenient; for then it cannot be safe to purchase under an administrator. 2 Mod. Rep. 146, *Abraham v. Cunningham*.

The archbishop shall grant administration of the goods of one dying intestate beyond sea. Rolls, 908.

Administration granted by a commissary being a bachelor at law, and not a doctor of law, is good notwithstanding the statute of 37 H. c. 17, which is in the affirmative, that doctors of the civil law may be commissaries though they are married, but is not in the negative that no other be commissaries; and if a bachelor could not be

to the appellant and appellee together, yet there was no cause of appeal, and the grant by the judge of the administration was confirmed, and the appellant condemned in 10*l.* costs. Sir Thomas Jones, 161, *Elizabeth Tayler, app. v. Dame Shore*.

commissary, yet acts done by him as commissary are good till avoided by sentence: and the court held, that if letters of administration be granted to one, and after granted to another, by this the first are not avoided, except by judicial sentence. Cro. El. 315; Hil. 36 El. *Prat v. Stocke*.

If an appeal be to judges delegates to repeal the probate of a will in an inferior diocese, they may examine the appeal, and repeal the sentence for the will, and adjudge he died intestate, but cannot grant administration to whom it belongs, but that must be done by the King. Bulstr. 2, 3, 4. This is intended where there was a former appeal to the archbishop; so if after such appeal to the delegates, there had been a further appeal to the King in the Court of Chancery, by the statute of 25 H. 8, c. 19, and the will had thereupon been also disproved, the administration is to be granted of the intestate's goods by the King. Mich. 24 El. *in banco*, Godb.

Brown made his will in writing, and constituted *D.* and three others his executors in trust for *M. B.* an infant, and died; administration with the will annexed was granted to *D.* one of those executors; *D.* by his will makes the plaintiff his executor, and dies, and administration with *Brown's* will annexed is granted to *Munn* the defendant during the minority of the said *M. B.* and to the use of *M. B.* and *Munn* puts in a caveat against the plaintiff's proving the will of *D.* until *Munn*, by force of a commission granted to him, had appraised the goods of *D.* and had

inspected all his books, papers and writings; the plaintiff appealed to the delegates, where *Munn* put in his allegations; and all this matter being suggested and read in *B. R.* a *mandamus* was prayed and granted to compel the judge of the Prerogative Court, that the plaintiff might prove the will of *D.* Raym. 236, 237. See *F. N. B.* 200, that a writ lies to compel the mayor of Oxford, or any ordinary, to prove a will.

Administrator of *J. S.* brought debt upon a bond and obtained judgment, and afterwards the administration is revoked, yet the plaintiff proceeded and took the defendant in execution: by motion the defendant was discharged, and the execution was void; for when the ground of his suit is overthrown, *viz.* his commission, he hath no authority to proceed further, and the execution issued without warrant. 1 Brownl. 91, *Barnhurst v. Yelverton*, Yelv. 83.

Administrator releaseth all actions, afterwards the administration was revoked and declared void by sentence; the release is void. *Throckmorton v. Hobby*.

Administrator, during the minority of an executor, shall be named administrator of the goods of *T. C.* during the minority of the executor of the said *T. C.* late executor of *E. C.* and shall not be named administrator of the goods of *E. C.* not administered by *T. C.* But had the infant been defendant, he should have been named but executor of the executor, for the rest follows, but

the committing of administration is of both. *Hob. 246, Norton's Case.*

An action was brought against the defendant as administrator during the minority of *J. S.* and the plaintiff shows in his count, that the said *J. S.* at the time of the writ was, and yet is, under the age of 21 years; and verdict *pro quer.* But judgment was arrested, for the declaration was insufficient, because the administration ceaseth at 17, so that he may be 18, 19, or 20 years of age, and yet the administration ceaseth, and so doth the action against such administrator, according to the resolution in *Pigot's Case.* 2 Brownl. 247, 248, *Brownhead v. Spencer.*

Lake declared as administrator of *N.* during the minority of the executor of *N.* (with the will annexed) brought debt upon a bond made by the defendant to *N.* but did not show in the declaration expressly, that such administration was committed to the plaintiff, and he brought in court *litteras testamentarias*, not saying, *litteras administratorias.* After verdict judgment was given for the defendant, because the plaintiff had not well entitled himself to this action; and it was resolved, that this was not aided by any statute of jeofails, though after verdict. T. Jones, 193.

In debt on a bond against *J.* and his wife as administratrix, the defendant pleads payment by the wife after the intestate's death, and on that issue found *pro quer.* Judgment was, *quod recuperet debitum* against them *de bonis testatoris, et si non, &c.* the damages, *de bonis propriis.* Per

Curiam. The judgment is well given. 1. Although the plea be false, yet he is altogether a stranger to the testator, and therefore the judgment shall be only *de bonis testatoris*, as where he pleads fully administered, which is false in his own conscience. 2. Although the wife hath not any goods during the coverture, yet because the husband is only charged in respect of the wife, and she might have goods if she survived, and execution might be taken against her, the judgment is good. Cro. Jac. 191, *Johns v. Adams*, Mich. 5 Jac. B. R.

A prohibition was prayed to the Admiralty (among other reasons) because a suit was brought there by the husband as administrator of his late wife, who died intestate, who was executrix of *J. S.* her first husband, upon a stipulation of 200 *l.* penalty made to *J. S.* whereas that suit should be by the administrator of the goods of *J. S.* not administered by his late executrix, and the proceedings in the Admiralty were stayed by the consent of the executrix's second husband, who was plaintiff in the Admiralty. Hardr. 473.

I will that *W.* shall be my administrator, or have administration of my goods with *N.* my executor: by this *W.* and *N.* are joint executors. 21 H. 6, 6. (a)

A. is cited to prove the will, and does not come in, and administration is granted to *N.* of *B.* if

Vide Plow.
Com. 281, b.
9 Rep. 37, b.
Hensloe's Case.

(a) So a direction that *A.* shall pay debts and funeral expenses is a sufficient appointment. 1 Hagg. Eccl. R.

after *A.* proves the will, the administration granted to *N.* immediately ceaseth; but all lawful acts done by *N.* before such probate binds *A.* and yet if administration had been granted to *N.* without citing the executor to prove the will, or before the time given to *A.* to prove it, then no act of such administrator would bind the executor. 3 H. 7. 14.

Sir *T. H.* was possessed of divers leases, and had issue *W.* and *T.* his sons, and makes *W.* his executor, and dies, and his will ran thus: "All the residue of my goods, debts and legacies being paid, I give to my executor." *W.* marries, proves the will, and makes election to have a tenement parcel of the demesnes, as legatee, and dies intestate before debts paid; the wife of *W.* shall have the administration, and not *T.* the son. So if executor die before probate, his executor may not take upon him the execution of the first testament, but administration ought to be delivered to him to whom the goods are bequeathed, otherwise to the next of blood. 2 Roll. Rep. 158, *Hinson v. Button*, 372, a.; *W. Jones*, 225.

Audita querela, an administrator recovers damages in an action of trover and conversion for goods of the intestate taken out of the possession of the administrator himself, then his administration is revoked; and the question was, whether he shall have execution of the judgment, notwithstanding the revocation of his administration? *Saunders*: I conceive he cannot, for the administration being revoked, his authority is gone.

Drury's Case, in the 8th Rep. is plain, and there is a precedent in the new book of entries, 89. Barrel: I conceive he may take out execution, for it is not in right of his administration; he lays the conversion in his own time, and he might in this case have declared in his own name; and he cited and urged the reason of *Packman's Case*, 6 Rep. 18, 19, and Cro. El. 460. He might bring the action in his own name, but the goods shall be assets. If goods come to the possession of an administrator, and his administration be repealed, he shall be charged as executor of his own wrong: now in this case the administration being repealed, shall he sue execution, to subject himself to an action when done? Twisden: I think it hath been ruled that he cannot take out execution, because his title is taken away. Judgment *per Cur. v. Def.* 1 Mod. Rep. 62, *Turner v. Davies*.

It hath been said, that executors could not waive a term (though if they could they ought to plead it specially), for it is naturally in them, and *prima facie* is intended to be of more value than the rent; if it should fall out to be otherwise, the executors shall not be liable *de bonis propriis*, but must aid themselves by special pleading. Mod. Rep. 16. Anon.

The plaintiff had judgment in debt against *John Brooks* the intestate, and took out a *fiery facias*, bearing date the last day of Trin. term, *de bonis et catallis* of *John Brooks*; before the execution of which writ *John Brooks* dies, and *Eliz. Brooks* administers, the sheriff's bailiff exe-

entes the writ upon the intestate's goods in her hands. Upon this, Baldwin moves the court for restitution; for that a *feri facias* is a commission, and must be strictly pursued. Now the words of the writ are, *de bonis* of John Brooks; and by his death they cease to be his goods. The plaintiff will be at no prejudice; the goods will still remain liable to the judgment; only let the execution be renewed by *scire facias*, to which the administratrix may plead somewhat. Wyndham: The property of the goods are so bound by the *teste* of the writ, as that a sale made of them *bona fide* shall be avoided; and since the intestate himself could not have any plea, why should we take care that the administrator should have time to plead? And of that opinion was all the court after they had advised with the judges of the King's Bench, who informed them that their practice was accordingly (a). But Vaughan said, that in his opinion it was clearly against the rules of law. But they said there were cases to this purpose in Cro. Car. Rolls. Moor, and 1 Mod. R. 188, *Farrer v. Brooks, adm.*

It was settled in the case of *Sir John Parsons v. Executors of Gill*, E. T. 13 W. 3, B. R. that the writ of *feri facias*, being *tested* in the lifetime of Gill, might well enough be executed upon the

(a) But by the 29 Car. 2, the goods are only bound from delivery of execution to the sheriff, which Statute was made in favour of creditors; therefore as to the party they are bound from the *teste* still.

goods that were in the hands of his executors, because by the *teste* of the writ the property of the goods is bound against all persons but purchasers. Blencow's MS. Rep. f. 196.

The same point, as against the party, was also settled in *Needham's Case*, E. T. 3 W. & M. B. R.

A man dies leaving issue by two several venters, *viz.* by the first three sons, and by the second two daughters; one of the sons dies intestate, the elder of the two surviving brothers takes out administration; and Sir Lionel Jenkins, judge of the Prerogative Court, would compel the administrator to make distribution to the sisters of the half-blood. He prayed a prohibition; but it was denied upon advice by all the judges; for that the sisters of the half-blood, being akin to the intestate, and not *in remotiori gradu*, then the brother of the whole-blood must be accounted in equal degree. 1 Mod. Rep. 209, *Smith's Case*.

Debt upon an obligation against an administrator; the defendant pleads a statute acknowledged by the intestate to the plaintiff, which statute is yet in force. The plaintiff replies, that it is burnt. The defendant demurs, and by the opinion of Wyndham, Atkins and Ellis, against Vaughan, the plaintiff had judgment. 1 Mod. Rep. 186, 187, *Buckley v. Howard*.

A great inconvenience would ensue, if men were allowed to administer as far as they would themselves, and then to set up a beggarly administrator; they would pay themselves their own

debts, and deliver the residue of the estate to one that is worth nothing, and cheat the rest of the creditors. If an administrator bring an action, it is a good plea to say, that the executor made by the will has administered. 1 Mod. Rep. 213, 214, *Parten and Baseden's Case*.

An executor's refusal before the ordinary after administration, is a void act. 1 Mod. Rep. 213, *Parten and Baseden's Case* (a).

Administration was granted to the sister of the half-blood of the intestate, and her husband, by the Prerogative Court, and the brother of the whole-blood sued there to have the letters repealed; and upon motion for a prohibition, upon this suggestion it was agreed by the Court, that the sister of the half-blood is in equal degree of kindred with the brother of the whole-blood within the statute. And so it was resolved, 1 Car. between *Glascock and Wingate*, known by the name of *Justice Yelverton's Man's Case*. And if the ordinary hath once executed his power according to the statute, he cannot repeal the letters upon a citation; but it was resolved that the statute was not observed in the grant of the letters in this case, because the husband who is not of kin to the intestate is joined with the wife; and if she should die before him, he should continue administrator against the meaning of the statute. And for this cause a prohibition was denied; but

(a) But he may retract his renunciation at any time before administration has passed the seal. 3 Phill. 374.—(E.)

it was said, that if it had been granted to them only during the coverture, perhaps it might have been good, because the husband might have administered during the coverture, though it had been granted to the wife only. *Sel. Cases, 36, Brown v. Wood.*

Executors shall be intended consuant of all contracts of the testator, as well contingent as certain. *Sel. Cases, 38, Eccles v. Lambert.*

Executors where chargeable in the *debit et detinet*, where in the *detinet* only. *Sel. Cases, 43, Boston v. Cordrye.*

In an action of debt brought by an administrator, the plaintiff declares of letters of administration granted to him *per Carolum Regem, &c.* without saying *debito modo, &c.* and upon a demurrer to the declaration it was adjudged good, because the King hath universal jurisdiction here. *Sel. Cases, 53, Hobson v. Wills.*

Letters of administration of the goods of Sir *John Lamb*, intestate, were committed by the Prerogative Court to the wife of *Hill*, being near to the intestate; and upon a suggestion of a suit there, by others of equal degree, for a distribution of the goods of the intestate, according to agreement made by the administrator, as was pretended. *Hale* prayed a prohibition, and it was granted; for the statute wills, that administration be granted to the next of kin, for their advantage; and when the ordinary, &c. hath once executed his power according to the statute he cannot alter it, nor

hath any power to compel the administrator to make distribution notwithstanding the agreement. And Hale said, that the Court there threatened to repeal the letters granted, unless she would bring in a true inventory of the estate of the intestate, and give a true account of her administration; to which Roll answered, that the Court there may cite her to bring in an inventory, and to give an account; but if it appear that they go about to repeal the letters for not doing it, you shall have a prohibition, which was not denied by Bacon. And Hale would have had a prohibition against all the cousins, as well those that sued there as others; because the proceedings there being *ex tunc*, the rest may join in the suit when they will, but the Court denied to grant any prohibition *quia timet*, &c. Sel. Cases, 56, *Hill et Ur. v. Bird*.

Where part of the arrears of rent demanded were due in the time of the testator, and part after his decease, the action in the *detinet* was good for the whole, as well as if all had been due after the death of the testator. And that after a verdict *quod non detinet*, the land shall not be intended of any value, as it is well known in these times, in many places, lands have been of no value, and yet the executor is liable as to the rent as far as he hath assets, and clearly if he hath assets he cannot waive his term. Sel. Cases, 76, *Cornish v. Conway*.

Debt against administrator, the point upon demurrer by the defendant was, whether the plaintiff

ought to show the name of him who granted administration to the defendant(a). Sæis, who demurred, cited Cro. Jac. 10, *Case de Wade et Atkinson*, 11 H. 4, 71, 72; *Vet. Int.* 300. 302, *Cur.* The allegation by the declaration, that administration was committed to the defendant *debita juris forma* sufficeth, without showing by what ordinary. Judgment *pro quer.* Sir T. Jones, 1, *Therold v. Baily*.

The defendant pleaded administration committed, and that he retained for satisfaction of a debt due to him by obligation; upon which the plaintiff demurred, and showed, that it doth not appear that administration was committed to the defendant, and then he had no colour to retain. Judgment *pro quer.* for the plea is insufficient. Sir T. Jones, 23, *Caverly v. Ellison*.

The plaintiff declared as administrator during the minority of six, and sheweth that five were under seventeen, and that the sixth had attained eighteen. The defendant demurred. Foster *pro quer.*: The declaration is good, notwithstanding the case of *Pigot*, 5 Co. 29. For that case was adjudged according to the usage of the judges of the spiritual law then in use; but now, by the stat. of 22 & 23 Car. 2, cap. 11, the law is altered

(a) Pas. 1 Jac. in Cam. Scacc. Judgment in debt against an administrator reversed, because he does not show by whom administration was committed, for he may as well take consuance by whose means he is administrator, as that he is so. Cro. Jac. 10, pl. 13.

in this point, and no administration may be granted, but to persons of the age of twenty-one years; for the statute requires bond to be given by the administrator, which may not be by an infant. *Cur. contra.* The administration is determined, and the statute hath not altered the law in this point. *Judgment quod nil capiat per billam.* Sir T. Jones, 48, *Joyner v. Watts.*

Administration granted before the renunciation of the executor, although he renounce after, the renunciation shall not make the administration good by relation, for it was void, not voidable only. 10 Co. 62, a, Sir T. Jones; 73, *Abraham v. Cunningham.*

Upon a *scire facias* out of the Chancery against the defendant as administrator for 800 l. debt due by his intestate, upon a recognizance acknowledged before Sir John Keyling, chief justice of the King's Bench; it was returned, that by inquisition it was found, that the defendant had wasted the goods of the intestate, and converted them to his own use to the value of the said debt; upon which the defendant appeared and traversed that he had wasted, and issue joined thereupon, and a special verdict was found to this effect, that before administration committed to the defendant, *John Hope* took into his hands all the goods of the intestate (*ultra* 220 l. value) and had disposed and converted them to his own use. That the defendant, after administration, sued the said Hope for recovery of the goods, or the value of them, and pending the suit; the defendant and

Hope covenant mutually, by articles sealed by each of them, 1. That the said Hope should deliver all the goods not sold by him in specie to the defendant, &c. and the defendant covenanted that he would defend at his costs all suits, and save Hope indemnified against all judgments and damages upon the said suits; and moreover it was found that Hope had not paid any money covenanted to be paid to the defendant, and that the defendant for non-payment had sued the said Hope, and arrested him, and that he was yet in custody upon the said suit; and moreover that the defendant had wasted the said goods to the value of 220 l. but as to the residue of the goods due, which Hope himself had possessed, the advice of the Court was prayed; and the question in law was, whether the defendant by these articles had made himself liable to a *devastavit* for the money not paid to him; and after divers arguments, it was resolved by the Court, that it was a *devastavit*, and that the administrator shall be charged, for the property of the goods was changed by this agreement, for the defendant had accepted of the said covenant, for the goods which operated as a sale by him, and otherwise Hope shall be twice charged, and it was the folly of the defendant to make such contract. And judgment was given for the plaintiff. Yelv. f. 10, *Case de Goring*, and Sir T. Jones, 80, *Norden v. Levett*.

Debt upon obligation by an administrator, *durante minore etate* of an executor *cum testamento annexo*; the plaintiff declared, naming him-

self as aforesaid, but did not show in the declaration that administration was committed to him; but *proferre litem testamentarias*, without saying *litem administrationis*; after verdict for the plaintiff, Pollexfen moved in arrest, that the plaintiff had not entitled himself to the action, for that he had not alleged that administration was committed to him. Within: After verdict it is aided by the late statute of jeofails. *Cur. contra*; and judgment, *quod nil capiat per billam.* 128. 1178 Jones, 193, *Lake v. Thacker.*

Debt against administrator or executor upon a devastavit, there must be a judgment upon the ground the action. *Calthers v. Burrows, Richmond v. Ux. adm.*

Hugh, administrator of *Charles Hugh* of London, deceased, is plaintiff in a prohibition, and sets forth his case upon 21 H. 6, and that the intestate was possessed of goods and chattels to the value of 12,000*l.* and died the 10th of March, 1666, and the 10th of April after, he having *lens notabilia*, administration was committed to his son the plaintiff. That the plaintiff being administrator did give bond with sureties, and that for the administration the bond is still in force, and he saith all the goods do belong to the person that is administrator; and that he the administrator ought to have the full and sole power to dispose the goods, and the remainder to himself; and he saith, he being nowise compellable by any law to come to any distribution of those goods, he was yet called into the court Christian by the

defendant his sister, daughter of the deceased. To this the defendant pleads, she did not proceed after the prohibition, and for a consultation she takes by protestation, that the plaintiff is not to have the goods solely. For plea she saith, that when any person dies intestate, and administration is granted, the administrator is to render account; and of the surpluse, by the ancient law of the kingdom, to allow every child a reasonable portion; and that there remains of Dr. Hughes, her father's estate, 3,000 l. unadministered, and she being a daughter unadvanced doth call upon her brother for a share into the Ecclesiastical Court; and upon this he demurs.

Debt against executors; the executors plead judgment, and no assets *ultra*. The plaintiff replies, they are kept on foot by fraud. The defendant saith, he did not keep the judgments on foot by covin; and because he saith not, *nor denyeth them*, adjudged naught. Calth. 192, *Rickfield and Un. v. Udal*.
 The testator by obligation was bound to the plaintiff in 40 l. to be paid upon demand, and that he required the testator in his life-time, and the defendants, since his death, to pay, and that they have not paid it. The defendants plead several pleas; *R. H.* pleads in abatement, that Sir Andrew Corbet died intestate, and that the bishop granted to him letters of administration, and saith, that he was never executor, but administrator, and demands judgment of the writ. To this it is demurred, because he doth not show the

letters of administration. The other two defendants say, fully administered on the 27th day of March 1664, and that before the said 27th of March they had no notice of this action brought by the plaintiff, and that from and after that time they had not assets. Upon this the plaintiff demurs, and after divers arguments judgment was given for the plaintiff. Calth. 227, *Meller v. R. H., Mary Overton, and W. H. ex.*

Title being made to a term by one as administrator, and no administration produced, the book of the Ecclesiastical Court where it was granted being produced, in which was entered the act of order of the Court for granting of it, it was allowed good evidence; and Twisden said, that so it was in the case of the Earl of Manchester. 1 Lev. 25, *Garrett v. Lister.*

By Twisden and Wyndham, justices, it was held, that where a man dieth intestate, having goods in several peculiars, that the granting of administration doth not belong to the ordinary of the diocess, but to the metropolitan of the province, for they are exempt from the ordinary jurisdiction. 1 Lev. Rep. 78.

Debt for rent as administrator; the defendant pleaded, that administration granted to the plaintiff was *debito modo* revoked and granted to J. S. The plaintiff replied, that he was next of kin to the intestate, and that he had sued an appeal from the said sentence; and after divers arguments in several terms, it was agreed by Kelyng and Twisden, that administration might be revoked for just

cause, as if it were unduly granted contrary to the statute at first, or if the administrator afterwards became disabled by lunacy; but it was adjourned, and long depended. But afterwards Bevil's saith (as he heard) judgment was given for the plaintiff, because by the appeal the sentence of revocation was suspended. 1 Lev. 137; *Pride v. Parker*.

It was agreed by all the four judges in the King's Bench, that where the ordinary hath granted administration according to the statute, that he may not revoke it without cause, because the grantee hath an interest in the goods by the statute, which the ordinary may not take from him without cause; but for good cause it seemed to them all that he might, as if the administrator become lunatic, &c. and Morten and Wyndham said, that the granting pending the *caveat* was cause to revoke it. And they said, that the judges delegates are the proper judges of what validity the *caveat* shall be according to their law; and it seemed to them that it is as a supersedeas in our law, and that as judgment given after it in our law is erroneous, so it is in their law after a *caveat*. But be it so or not, it is to be adjudged by the delegates, who are the proper judges of this matter of proceeding in their courts touching a matter ecclesiastical which belongeth to their courts, and not to this court, which is not apprized of their forms and manner of proceeding. And for that cause they held the prohibition ill granted, and that a consultation ought to be granted, but the

Court being divided, it remained as before as to the prohibition. 1 Lev. 186, *Offley v. Beets*.

Administrator *de bonis durante minore aetate*, *J. S.* obtained judgment, and in a *scire facis* against the bail he pleaded that *J. S.* was now of full age; upon which the plaintiff demurred; and adjudged no plea. For this recognizance is to the plaintiff himself by name; although that he had the administration *durante minore aetate tantum*, and the coming of the infant to age shall not hinder the plaintiff to sue the *scire facis* against the bail. But by Hale, if he had taken execution upon the principal judgment; after the infant came to age, it had been a doubt whether it ought to be sued by him, or by the infant. 2 Lev. 37. *Embrin v. Mompesson*.

Where administration granted to the next of kin, when there is residuary legatee, is revocable or not. 2 Lev. 55, *Thomson v. Butler*.

It was said by Hale, and by none denied; if a man die having goods in the several provinces of York and Canterbury, several administrations ought to be committed, and so it is if in England and Ireland. 2 Lev. 86, *Shaw v. Stoughton*.

Administration was granted, and the administrator possessed of a term by virtue of it, and made a lease, then came a citation to repeal this administration; and it was affirmed, of which sentence of affirmation there was an appeal sued, and the sentence of affirmation was repealed, and the first administration repealed, and administration granted to another. By Hale *et totam Curiam*,

this new administrator shall not avoid the lease made by the first administrator ; for that is no more than a repeal of the sentence in the citation, and so of the nature of the suit in the citation, and so is all one as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had been brought originally upon the first administration, by which it had been totally annulled. 2 Lev. 90, *Semine v. Semine*; 6 Rep. 18, 19, *Packman's Case*.

In a prohibition the case was, a man died intestate, having *A.*, *B.* and *C.* brothers of the whole blood, and *D.*, *E.* and *F.* of the half blood; administration is committed to *A.* and the ordinary would bind him to a distribution equally between all of the half blood, and the whole blood, and it was argued at bar in several terms, and for the prohibition it was said, that of acts of Parliament the Judges of the common law ought to judge, and the half blood is not regarded at common law, nor may they be heir the one to the other, nor may the testator or intestate be presumed to have so great affection to the half blood as to the whole blood. Therefore it is not reason that the ordinary should give him equal part of his estate; and the statute law being silent, whether the half blood be of kin, but only appoints the division to be between the kin of equal degree, it ought to be determined by the common law, which is of kin, and which is the equal degree; and by them were cited *Fitz. De*

is concealed, void and not made good by the renunciation of the executor afterwards. *Lev. 2, p. 189, Abraham v. Cunningham.*

Debt for rent by the lessor against the administrator of the lessee, he pleaded, that before the rent due he had assigned the term; upon which the plaintiff demurred, and after divers arguments it was adjudged for the plaintiff; for the privity of the contract continued between the lessor and the administrator of the lessee, as it was between the lessor and lessee themselves; and it is not contrary to *Overton and Sidal's Case*, cited in *Walker's Case*, 3 Co. 24, and in Pop. Rep. 120, Co. El. 555; and Windham said, that an executor may not waive a term so, but that he shall be charged for the rent if he have assets; for he is obliged to perform all contracts of the testator if he hath assets, be the rent above the value of the land or not, which was not denied; and Kelyng said, he may not so waive, but that he shall be charged in the *detinet*, upon which the assets will come in question; and if he continue in the possession he shall be charged in the *debt et detinet*, in respect of the perception of the profits, hath he assets or not; to which Twisden agreed. 1 Lev. 127, *Helier v. Caschert.*

Debt for rent as administrator of an administrator of a lessee for thirty years, who demised to the defendant for twenty years rendering rent; and that the first administrator had paid debts of the first intestate to the value of the term; upon which the defendant demurred, because the plain-

self, shall be charged *de bonis propriis*; and so the court held, that the declaration was not good, but it is helped by the verdict by the stat. *de Jeoffais*, made at Oxford. Levinz of counsel for the defendant. 1 Lev. 250, *Frevin and Uxor v. Pageton*.

Assumpsit upon a promise of the testator for 10000*l.* the defendant pleaded a recognizance in chancery for 2000*l.* and several judgments against himself after exhibiting the bill, and pleaded payment of them severally, and pleaded several obligations to several persons, and payment of them after exhibition of the bill, and that he had fully administered, and that he had not at any time after the bill any goods, except *bona ad valentiam* of the several sums paid upon the several judgments and obligations *et præterquam bona ad valentiam 5*l.* quæ onerata existantia et non sufficiunt ad satisfaciendum la recognizance*. The plaintiff replied, *protestando*, that the judgments were had by fraud and covin; *pro placito* he said, that the defendant paid not the money upon the said judgment to *A.* nor upon the said judgment to *B. et sic de cæteris*; and in like manner he pleaded non-payment severally of the said several sums upon the said several obligations, omitting some, *et de hoc ponit se super patriam*. And as to the recognizance it was satisfied and kept on foot by fraud and covin, upon which the defendant demurred; and now he excepted to the replication. 1. Because it was double and manifold, putting all matters in issue where non-payment of *one* would have made an end of all

but *non allocatur*, for the plaintiff hath election to traverse one only, or every one; for he might be mistaken in one, and therefore it is good to traverse so many of the matters as he pleaseth; and so it was done in *Trecking's Case*, and *Turner's Case*, 8 Rep. and all precedents are so. The pleading *non solvit* to the one, nor the other, &c. then *et de hoc ponit se super patriam* is good, for they are several issues under the *et de hoc ponit se*, &c. and not one multiferous issue, as was objected.

3. The omission of pleading to some of the sums paid upon the obligations hurts not; for he may plead to as many of them as he pleases and omit the others.

4. Although that he mistook some of the sums to which he pleaded *non solvit*, it hurteth not; for it is no more than if he had said nothing to them; and judgment was given for the plaintiff. 1 Lev. 281, *Jeffries v. Dee*, adm.

Assumpsit, and called herself administratrix of J. S. and declared, that the defendant was indebted to her 300 l. but did not say indebted to her as administratrix; but then declared of another debt due to her as administrator: and that upon an account between them, the defendant was found indebted to her other 30 l. and promised to pay the same; and upon *non assumpsit*, a general verdict, and entire damages, upon which it was moved in arrest of judgment, that the first promise is, and ought to be intended of a debt due to the plaintiff *in proprio jure*, although that she named herself administratrix, *et in fine narrationis*, produced the letters of administration, yet it was only

To warrant the second account which is *in jure intestati*. To which it was answered, admitting the first promise to be *in jure proprio*, yet the last being upon an account with herself, and the promise was to herself in her own time, they may well be joined in one declaration; and one general verdict and entire damages also might well be intended after verdict, that the first debt was due to her as administratrix, although that it was not so expressly said; and judgment given for the plaintiff. *Twisden totis viribus e contra.* 2 Lev. 110, *Curtis v. Davies.*

Debt for arrears of rent as executor, and also as administrator, *durante minore ætate* of his co-executor; and declared, that the testator made the plaintiff and the other co-executors, and that *J. D.* beised of a rent of 20 *l.* per annum devised it to three persons in equal parts in common, and that all the three devisees levied a fine thereof as to one moiety to the wife of the testator in fee, and as to the other moiety to the use of a stranger in fee, and that the stranger granted his moiety to the wife of the testator in fee, by whom the testator had issue, and the wife died; whereupon the testator was seised in the whole by the curtesy of England; and that the rent became due to the testator, who made him and the other his co-executors, and that he alone proved the will, and had administration granted to him during the minority of the co-executor, who is yet within age. Upon which declaration the plaintiff demurred; and now for the defendant two things were insisted

on. 1. That this rent being a charge is against common right, and cannot be so divided, and thereby to make the terre-tenant subject to several distresses without his assent; and here is no attornment, Co. Lit. 148, *a.* otherwise it is of rent-service of things which are of common right. Hob. 25. Grantee of a rent granted part by fine, the tenant is not obliged to attorn: therefore here the devise and the fine to the uses divided is not good. Agreed, that to the devise, or to the fine to uses attornment is not necessary; but a devise or fine to uses of things not dividable may not divide them, but the devise and the fine to uses is for that reason void. 2. Both executors ought to join in the action, although that one alone proved the testament, and executor and administrator to the same person are inconsistent; for where there is an executor the ordinary hath no power to grant administration. 9 Co. *Hensloe's Case*, and Yelverton, 130, *Smith v. Smith*, and *Cunningham's Case* adjudged lastly. To which it was answered by the counsel of the plaintiff, and resolved by the Court: 1. That by these conveyances of devise and fine to uses, the rent may be divided without the assent or attornment of the party, because his assent or attornment is not requisite for the perfection of these conveyances. 2. Where one of the executors is an infant, and may not prove the will, administration *durante sua minori etate* may be granted to the other, who alone shall bring the action; and it is not inconsistent that he shall have the administration in

such case; for that it is not granted as upon one dying intestate, for the will is proved, but only to enable him to sue alone; because that the other is not capable of proving the testament, and so not to join with him, and he may not sue alone. 2 Lev. 239, 240, *Colborne v. Wright*.

Assumpsit against defendant as administratrix to her husband, for 20 l. 10 s.; the defendant pleaded that the intestate was bound in a statute of 2,000 l. to *Cordel, pro vero et justo debito minime soluto*. The plaintiff replied, that Cordel sued an extent and *liberate* upon the statute, and had lands delivered and accepted by him, and the return of the writ *prout patet per recordum*. The defendant rejoined, that the sheriff who returned the writ was removed from his office, by which the return was void. The plaintiff demurred generally, and had judgment; for *per Cur. Cordel*, by accepting the lands upon the *liberate*, was concluded to have other execution against the goods of the dead, and so the administratrix is not chargeable upon the statute. Fitz. Execution, 84; 2 Cro. 694; and 15 H. 7, 15, 16, *Delenham's Case*. And this very point was resolved lately in the court of Common Pleas, between *Johnson and Young*, for the presumption, that by the acceptance of the lands the statute is satisfied; and as to the plea, that the sheriff was removed before the return, it is contrary to the record, and not receivable; for which the plaintiff had judgment. 3 Lev. 269, *Barker v. Dye*, adm.; Pas. 2 W. & M. in C. B.

in the life of the intestate in the *detinet* (a),
 and for 64*l.* in his own time in the *debet et detinet*. See 1 Wilson,
 the defendant demurred; and adjudged the action 171, 172
 do not lie to charge him in the *detinet* for part,
 and the *debet et detinet* for the other part, which
 requires several judgments; *scil. de bonis propriis*
 for the arrears in his own time, and *de bonis intes-*
tatis for the arrears due before his death, and the
 averring of the said sums in the declaration is not
 sufficient, but he ought to have several actions.
 Lev. 74, *Salter v. Cobbold*, adm. Mich. 34 Car. 2,
 C. B.

Scire facias against the defendant as adminis-
 trator of *Mary Sachwell*, against whom the plain-
 tiff had obtained a judgment for 1,700*l.* and 5*l.*
 damages, as administratrix to *Henry Sachwell* her
 husband, *de bonis predict.* Hen. Sachwell *si tant-*
um et si non tantum. &c. *dampna de bonis suis pro-*
missis, and suggested that Mary had goods suffi-
 cient of Henry, but that she had wasted them.
 The defendant pleaded, that Mary had fully admi-
 nistered the goods of Henry, and traversed the
vastavit, and *quoad* the 5*l.* for the damages
 added payment to the plaintiff by Mary Sach-
 well. The plaintiff *quoad* the first plea maintained
 the waste, and thereupon issue, and *quoad* the 5*l.*
 added *non solvit*, upon which also another issue.

(a) 1 Sid. 266. 342; 1 Lev. 128. 130. 224. 250; 2 Lev.
 162 Jo. 169; Cro. El. 711. 840; Cro. Jac. 238. 549;
 1. Car. 225; Vide Lev. Ent. fo. 52.

the confession of the judgment to the plaintiff she had made herself liable to it; for she might have pleaded the obligation of 2,000*l.* in bar of 2,170*l.* being due upon contract to the plaintiff, which not having done, she shall be charged to pay it notwithstanding the other judgment for her proper debt. As if an administrator hath assets to the value of 100*l.* only, and confess two judgments to two several persons for 100*l.* a-piece, she shall be obliged to pay both, as if she had given to them two several obligations to pay them. By Pemberton, Windham and Charlton, it not being found that at the time of the judgment confessed to the plaintiff, she had notice of the obligations upon which she paid 63*l.* she shall not be charged for the said 63*l.* neither shall it be a *devastavit* in law; for they held, that an executor who paid debts upon contracts, where there are debts by specialty not paid, whereof they had no notice, it shall not be a *devastavit* by payment of the debts upon contracts, they not having notice of the specialties; but Levinz *totis viribus contra*, in this point: he agreed, that if executors pay a debt of equal nature after writ brought for another debt of the same nature, they shall be excused if they have not notice of the writ; but they may not pay a debt of inferior nature after writ brought for a debt of superior nature, have they notice of the writ or not. Nor was it at any time seen before, that want of notice of the specialty shall excuse payment of a debt upon contract. But by the other three judgment was given *ut supra*.

But Charlton told Levinz afterwards that he recanted his said opinion in this point. 2 Lev. 113, *Britton v. Bathurst*.

The act of the Court sufficient proof of administration.

In ejectment tried at the bar, where the plaintiff made title as administratrix, and proved her administration by the act of Court, by the granting of it to her; and it was admitted sufficient *per tout le Court*, without showing the grant of it under the seal of the Court. 1 Lev. 101, *Pease-lie's Case*.

Upon an exception taken to a declaration, that it was not good, because he declared as administrator upon letters granted *per archidiaconum*, and did not say, *loci illius ordinar*. nor *cui de jure* it belonged to grant it. The Court held it good in case of the archdeacon, as well as in the case of the bishop, for the archdeacon *est oculus episcopi*; and by Twisden the declaration is good without saying, *loci illius ordinar*. because he produced his letters of administration. Otherwise in bar. 1 Lev. 193. *Dring v. Respasse*.

Debt upon an obligation against an administrator, who pleaded *plene administravit*; upon which the plaintiff prayed judgment, according to *Shipley's Case*, 8 Co. and after brought a *scire facias* upon assets which happened afterwards, and had judgment in *C. B.* upon which error was brought in *B. R.* and assigned in the first judgment that it ought not to have been given upon the plea of *plene administravit*, and for this *Dorchester and Web's Case*, 1 Cro. Hutton, 128, and Rast. Entr. 323. 329, were cited; but *e contra* were cited

Shipley's Case, and Trin. 13 Jac. Rot. 1104, and Mich. 13 Jac. Rot. 206, both in this court. Kelyng, Rainsford and Moreton held, that the judgment ought to be affirmed according to *Shipley's Case*. *Twisden* *dub.* and took exception, because the defendant was in *misericordia*, where the plaintiff was not delayed, for the plea is a confession of the action. *Cæteri*: It is not a direct confession, but as an admittance of the debt, and it is after imparlance; and they affirmed the judgment: 1 Lev. 286, *Noell v. Nelson*.

Scire facias teste 12 Feb. the last day of Hil. term, by the plaintiff as administrator against the defendant as terre-tenant, who imparled generally, and afterwards demanded *Oyer* of the letters of administration, which did bear *teste* 26th of March after, between Hil. and Easter term in the time of vacation; upon which the defendant pleaded it in abatement. The plaintiff thereupon demurred, because he might not plead it in abatement after a general imparlance. But *per Cur*: It appearing now upon the record, that the plaintiff had brought his action before the cause of action, the Court *ex officio* ought to abate the writ; and so they did, although that he could not have *scire facias* tested after the 12th of Feb. till *term Pasch.* in this court; and although *in rei veritate* he might sue after the administration granted in time of vacation. Otherwise it is where the suit is by original out of the chancery, where the court is always open. *Tamen quare* of this judgment; for it appeareth not truly upon the record when the

administration bore *teste*, that coming in after general imparlance. *Quere tamen*, for the Oyer might be after imparlance. 2 Lev. 197, *Harker v. Moreland*.

And now, having supplied what I have thought necessary to make a work of this nature complete, and in all its parts conformable to the present time, and laws now in force; future times may produce occasions for future additions: but, as perfect to this time, I may at present put thereto

FINIS.

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